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A
T R E A T I S E

O N

The Law of Corporations.

VOL. II.

A
T R E A T I S E

ON

53887

The Law of Corporations.

BY STEWART KYD,

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

VOL. II.

L O N D O N :

PRINTED FOR J. BUTTERWORTH, FLEET-STREET.

1794.

ADVERTISEMENT.

WHEN the Author published the first volume of this work, he supposed, from the appearance of the materials which he had collected, that they would be sufficient for two additional volumes; he has, however, been able to compress them into one, so that the present volume completes the work.

TOWER, *Sept. 1, 1794*;

Where the last Chapter was written, during the Author's confinement on a warrant of commitment for High-Treason.

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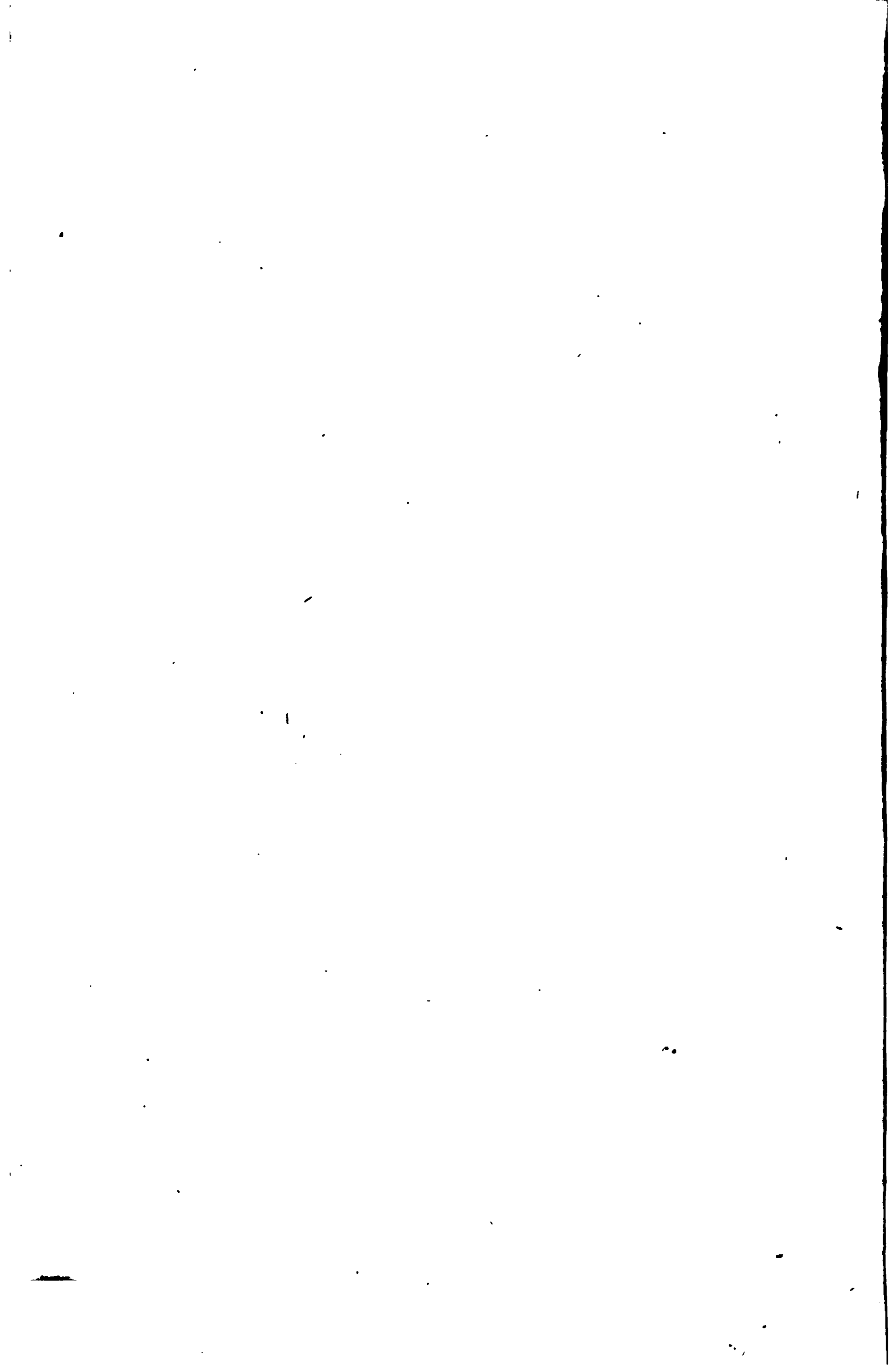
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T R E A T I S E

ON THE

LAW OF CORPORATIONS.

CHAP. III.

OF CORPORATIONS CONSIDERED IN RESPECT TO THEIR
INTERNAL CONSTITUTION.

SECTION VIII.

Of Elections in Corporations.

WHERE a collective body of men, having one common interest, find it necessary to delegate the management of their affairs to particular individuals, the appointment of those individuals must, previous to any particular constitution, naturally and necessarily be by the election of all the members of the community ; so that, where a corporation has grown up by length of time, without a charter,

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of which there are numberless instances, though in every such case, by fiction of law, a charter is supposed, we may conclude that originally all elections were made by the body at large: and however it might be found convenient to delegate to the heads of the corporation, when so chosen, the appointment to the mere ministerial offices, it seems difficult to explain how the appointment of the heads themselves should have come to be in the power of any select body: yet, in fact, we find that in many corporations by prescription, the body at large has, by long continued custom, been totally excluded from a voice in the choice of the principal members (*a*). And, where it is not improbable, that the right of election had continued long in its original and natural channel, we find not a few instances of its being abridged by subsequent charter, and the whole power of the corporation thrown into the hands of a select body (*b*).

IN corporations by prescription, the time and manner of election, and the qualifications, both of the electors and of the persons to be elected, depend principally on custom; and in corporations by charter, on the provisions of the charter.—But it has been said (*c*), that if a charter by which a corporation is erected make no express provision for continuing the succession, the corporation will be dissolved on the death of the first members of the governing part, as if a charter erect a corporation to consist of a mayor, twelve aldermen and commonalty, and nominate the first mayor and aldermen, but say nothing about the election of a new mayor and aldermen on the death of the old; in such a case, it is said, there can be no new election,

(*a*) Vid. Miller on Government, 404, 405.

(*b*) Vid. Haddock's case, Raym. 435. (*c*) Vid. 3 Mod. 13.

but

but when the mayor and aldermen die the corporation will be dissolved.

THIS opinion seems to have arisen from a note at the end of the case of *Dungannon*, in Ireland, reported in that book of reports which is known by the name of Sir Edward Coke's twelfth report (a). The King constituted the town of *Dungannon* a free borough, and further "willed, declared, and ordained, that the inhabitants of the town aforesaid should be one body corporate, by the name of Provost, twelve Burgesses and Commonalty of *Dungannon*, and by the same name might implead; and that they, the aforesaid provost and burgesses, and *their successors*, should have the power of electing two burgesses to parliament:"—The question submitted to the judges on this case was, whether this grant of election of burgesses to parliament was good, because the power was given to the provost and burgesses, who were part of the corporation only, and not to the provost, burgesses and commonalty at large.—The reporter is not satisfied with stating the opinions and decision of the judges on this question; but adds from himself, "and note, all the new corporations were of the same form, and in none of them is any clause to elect new burgesses, *so that when those of the modern burgesses die, this power to elect burgesses is gone.*"—That is, the power to elect burgesses to serve in parliament is gone after the death of the burgesses appointed by the charter; from which he manifestly intimates, that the corporation had no power to elect new burgesses in the room of any of the twelve who should happen to die.

How this is to be reconciled with the maxim, "that it is necessarily and inseparably incident to every corporation to have perpetual succession, and that therefore all *aggregate*

(a) 12 Co. 120, 121.

corporations have a power, *necessarily implied*, of electing members in the room of such as are removed by death or otherwise" (a), it is difficult to say; and yet this maxim has generally obtained, and the case in which it appears to have been first laid down, has been considered as authority. This is the case of Hicks against the town of Launceston, which is reported in Roll's (b) abridgment, in words to this effect: "if the King create a corporation of a mayor and eight aldermen, with a clause in the charter, that on the death or removal of any of the aldermen, the mayor and other aldermen, or the major part of them, may, within eight days next after the death or removal, elect another alderman in his place; in such a case, though no election be made within eight days after the death of an alderman, yet they may elect one at any time afterwards, *for the power of election is incident to the corporation*, and ancient corporations have no such clause giving power to elect, and this *affirmative* power to elect within eight days, does not take away the power implied as incident to the corporation."

It is to be observed, that the *whole* corporation in this case, as it is here put, consists of the mayor and eight aldermen *only*, and has no other component parts; on which supposition the incidental power of election, if it exist at all, is properly attributed to the mayor and surviving aldermen.—But if the corporation had been stated to consist of a mayor, eight aldermen and commonalty, and the power of election given to the two first component parts, exclusive of the commonalty, I apprehend the maxim would have been misapplied; because, if the power of election *be* incident, it must be incident to the whole corporation, and not to a select body.

(a) Vid. vol. 1, p. 69.

(b) 1 Rol. 514. Vid. the same case cited as to another point, vol. 1. p. 326.

THAT it is incident, there is little doubt, both from the nature of the thing and the authority of this case, notwithstanding the *dictum* before mentioned to the contrary: but it seldom happens that it can be put in execution, because corporations by charter being the mere creatures of the charters which constitute them; and corporations by prescription being regulated by long continued usage, which is equivalent to a charter, the power of election must be exercised under the modifications of the charters or the usage; and in most corporations of both kinds, both the power of election and the capacity of being elected are confined to persons of a particular description; so that when by accident there is no longer a sufficient number of these persons to make a regular election, the *power* of election is gone.

THERE cannot properly be any election to an office which is not actually vacant; though it may be a practice in some places to choose a person before hand, which may be called an inceptive election, and on the death of the predecessor, to admit the person before nominated, which completes the election: but such an inceptive election is not binding on the electors: and when the vacancy really happens they may elect another.

DR. Owen applied for a mandamus to be admitted a prebendary in the church of St. David's, and set forth a custom, that the prebendaries, when all the places were full, used to choose a supernumerary, who on the death of the next prebendary was admitted: he stated that he was chosen a supernumerary in the year 1658, that A. B. one of the prebendaries, was since dead, and that Dr. Stainoe was admitted instead of himself.—The court held the custom to be nugatory and void; and would grant no mandamus on the principles above stated (a).

(a) Skin. 45.

IF the election of a particular officer be, by ancient charter, vested in one body, a subsequent one cannot of itself alter the mode of election; but if the subsequent charter be accepted by the corporation at large, or if they acquiesce under it, and act in conformity to it, which is evidence of acceptance, the latter mode of election is valid.

By a charter of Henry 4, it was granted, that the mayor, aldermen, and citizens of Norwich, might elect two to be sheriffs of that city: Charles the second, in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one sheriff, and the citizens the other.—The subsequent elections were made according to the provisions of the latter charter, and were held good by the opinion of two justices against one (*a*).

THE privilege of election may be in one body, and the privilege of approbation in another: thus the privilege of election to the office of alderman in London and in Norwich is in the ward, and that of approbation in the mayor and aldermen: but if the mayor and aldermen reject, without reason, one chosen by the ward, a peremptory mandamus will be granted to admit him (*b*).

IT has been seen (*c*), that where there is no clause enabling the mayor expressly to hold over, that power is not incident to his office: in this respect he differs from those officers who are *usually* chosen for life, but *may* be directed to be chosen annually; for in this case, if there be no election at the end of the year, the former are to continue till others be chosen.—In the case of Truro, in Cornwall (*d*),

(*a*) Skin. 574, 5, 7. Holt, C. J. being one of the two. Vid. vol. 1. p. 67, 68. (*b*) Vid. 2 Salk. 436.

(*c*) Vid. vol. 1. p. 376.

(*d*) Foot v. Prowse, mayor of Truro. 1 Str. 625.

the mayor was to be chosen out of the aldermen, who were *to be annually chosen*: on a trial at bar, on the question of the validity of the defendant's election to the office of mayor, it appeared, that the aldermen present at the election had been aldermen for several years, and that none of them had been re-elected within a year before: on a bill of exceptions, the court were of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But on a writ of error brought in the Exchequer chamber, after two solemn arguments the judgment was reversed, on the principle, that the words "to be annually chosen" were only directory, and that an annual election of them was not necessary to make an election in their presence good: and the Chief Justice of the Common Pleas, who delivered the opinion of the court, compared this case to that of a constable and other annual officers, who are good officers after the year is expired, until another be elected and sworn. And this reversal was affirmed in parliament.

WHERE the number of electors is *indefinite*, and some persons who are unqualified vote in the election; on the want of qualification being discovered, it would seem that the bad votes ought to be rejected, and the election to be decided according to the majority of good votes. It seems likewise that when, by the constitution of the corporation, the candidates to be put in nomination are not limited to a particular number; if some be qualified and some unqualified, and some of both kinds be chosen, the election is good as to those who are qualified, and void only as to the others.—But where, by the constitution, the number of electors is limited, and in that limited number there are some who vote without being qualified, it would seem, from the reason of the thing, that the election is void for the

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whole;

whole; unless there be so many good votes for the candidate chosen, as would constitute a majority of the whole limited number.—Where the number of *candidates* is limited, there seems still stronger reason why the election should be void for the whole, where there are unqualified candidates, even if none of the latter be chosen; for, perhaps, had there been no unqualified candidates, others might have been chosen in preference even to those of the candidates who were duly qualified.

THE town of Bedford is a borough by prescription, and, time out of mind, on the Monday next after Bartholomew day, there had been put in nomination twenty-six burgesses, who were to choose from among themselves thirteen for common councilmen, which common councilmen, when chosen, had votes at the election of the mayor and other officers of the borough:—Here the number, both of the electors and candidates, was limited to the number of twenty-six burgesses:—One Benson, who was a freeman but not a burgess, was put in nomination with twenty-five others, who were duly qualified as burgesses, and was chosen to be one of the thirteen common councilmen.

ON finding that Benson was not qualified to be one of the twenty-six, the mayor proceeded to a new election, and one Devereux was chosen in the room of Benson: Hughes, who was one of the twenty-five burgesses put in nomination with Benson, and next to him, had most votes for the office of common councilman, prosecuted an information against the mayor and the twelve common councilmen, as not being chosen by twenty-six qualified burgesses (*a*); and it was insisted, either that the whole election was void, or that if it was not, yet Hughes, the per-

(*a*) There must be some mistake in the report in this place.

son who had the greater number of votes after Benson, was duly elected, and the subsequent election of Devereux was void.

IN support of the first proposition it was said, that where by the custom of the place a determinate number of persons are to choose, or the election is to be made on a particular day; if it be not made on that day, or not by that number of persons properly qualified, or any one not qualified be chosen, the election is altogether void, and not, in the latter case, as to the unqualified person alone: and a distinction was taken between disabilities apparent at the time of the nomination, and such as might not be discovered till afterwards, as where the person chosen had not received the sacrament within the year; for such disabilities not being known at the time of the election, it might perhaps be unreasonable, on that account, to consider the election as totally void from the beginning: but it was contended, that in the principal case, it was in their power to be duly informed of the truth, because they had all the borough books in their custody, and ignorance could be no excuse, where they had all the means of information in their power.

THE Chief Justice and two of the other judges declared, that what was insisted on by this motion for the prosecutor, would introduce great inconvenience; for if this should be adjudged a void election as to the whole, then the borough would be destroyed, because there could not be another mayor, nor could any thing be done by common councilmen.—They held, therefore, that if some candidates unqualified, as Benson was, were put in nomination with those who were qualified, as the other twenty-five were, and an unqualified person was chosen, as Benson likewise was,

was, the election was void as to him only, and not as to the others who were duly qualified.

BUT the other judge said, it was not clear to him how thirteen common councilmen, who, by the custom of the place, were to be chosen out of twenty-six qualified burghesses, could be lawfully chosen out of twenty-five, and that they might as well be chosen out of any other number, if the custom were once broken through: he was of opinion, however, that if the election was good at all, Hughes, who had the greatest number of votes of the twenty-five burghesses duly qualified, next to Benson, was duly chosen.

THE court not being unanimous in their opinion, the rule was enlarged as to Devereux, the person elected by a subsequent election (a), and discharged as to the rest, and afterwards the question was, whether, if a person unqualified were chosen by a majority of good votes, and his election set aside for want of qualification, the person properly qualified, who had the greatest number of votes next to him who was unqualified, should be adjudged duly chosen, or whether there must be a new election?

THE court held the new election to be good, as well on account of the circumstance, that it was not known at the time that Benson was not qualified, as to avoid what they conceived to be an incurable inconvenience.

THE inconvenience to which they alluded, was the dissolution of the corporation, though it be difficult to conceive how that could be the consequence of deciding in favour of Hughes, any more than that of deciding in favour of Devereux, because in either case the number of common councilmen would have been complete.

(a) Here is another proof of the inaccuracy of the report of this case.

THIS

THIS case is different from those cases in general where the power of election is in a select body, and therefore the rules which prevail in the latter, cannot with propriety be applied to the former.—In general, it is sufficient if the majority of the select number be duly assembled; but here, by the very nature of the custom, it would seem that no number less than the twenty-six can proceed to the election at all; the nomination of that exact number is a necessary preliminary to the election: suppose only twenty-five had been actually nominated, could it have been contended that an election by these was in pursuance of the custom? If it could not, it seems difficult to defend the judgment of the court: for the circumstance of one of the persons nominated being unqualified, renders the case the same in effect as if no more than twenty-five had been nominated. But the court went upon the ground of the inconveniency that would ensue from determining the election to be void; a circumstance which ought to be of no weight against the manifest conclusion from the nature of the case.

HAD the want of qualification in Benson been known at the time of the election, the decision in this case would also have been directly contrary to the authority of other cases on the same point, even on the supposition that the first election was only void as to Benson himself: for it has been frequently decided, that where a person elected is unqualified, and the electors at the time have notice of the want of qualification, their votes to him will be thrown away; therefore the person who has the next greater number to the unqualified person, as Hughes had in this case, is to be considered as duly elected (*a*).—The first case on this point is that of the Queen and Boscawen (*b*): there

(*a*) Vid. Cowp. 536.

(*b*) Pasch. 13 Ann. B. R. cited 2 Bur. 1021, and Cowp. 537.

ten voted for Roberts, who was a qualified person, and ten for the defendant, who was unqualified on account of non-inhabitaney. Lord Chief Justice Parker, and the whole court, held that the votes given for the latter were *thrown away*, and Roberts duly elected. This was the case of an *equal* number ; but the same principle applies to the case of a minority. In the case of the King and Withers (*a*), *five* voters out of *eleven*, voted for the defendant upon a *single* vacancy of a burgess for the borough of Westbury : *six* others voted for *two* persons *jointly* : and the court held that the *double* votes were absolutely thrown away. So, in the case of Taylor against the mayor of Bath (*b*), twenty-eight electors being assembled, fourteen voted for A, thirteen for B, and one for C. A, who had the fourteen votes, was unqualified, and his incapacity known to the electors at the time. Lee, Chief Justice, in his direction to the jury said, that the votes given to A, with notice of his incapacity, were thrown away. It afterwards came before the court, when Lee compared it to the case of voting for a dead man, and held that B, who had the thirteen votes, was duly elected : and Mr. Justice Page said, that in such a case, a *minority* of *two* only would have been sufficient to elect the other candidate.

WHERE a candidate is proposed in a corporate meeting, duly assembled, and a majority of the persons assembled protest against any election, and do not propose any *other* candidate, the *minority* may elect the candidate proposed.

IN the case of Oldknow and Wainwright (*c*), it appeared by a special verdict, that the right of electing a town clerk of the town of Nottingham was in the mayor, aldermen,

(*a*) Pasch. 8 G. 2, B. R. cited 2 Bur. 1020. Cowp. 537.

(*b*) Mich. 15 G. 2, B. R. cited Cowp. 537.

(*c*) 2 Bur. 1017.

and

and common council; that the whole number of electors was twenty-five, and that the votes were all equal; that out of that number twenty-one assembled on the 26th of May, in consequence of a regular summons; that the mayor put Thomas Seagrave in nomination; and that no *other* person was proposed: that nine of the twenty-one voted for Seagrave; that the other twelve did not vote at all; but eleven of them protested against any election at that time, because they alleged the office was already filled by one Foxcroft, whose right was then under litigation; that ten signed a written protest to this purpose, and that another did not sign nor vote, but declared that he suspended doing any thing: and that the mayor declared Seagrave duly elected, who took the oaths of office, and the other requisite oaths, in due manner and form.

IN support of this election it was contended, that this protest against any election at all, was not a negative either expressed or implied against Seagrave; and that as *no other* person was proposed, and nine voted for him, and none against him, he was well elected: that if the protesters had gone away and left the assembly, it would have made no difference, after the business was once begun: and that it did not appear that the protesters would *not* have voted for Seagrave, *if* they had voted at all.

LORD Mansfield said he saw no doubt in this case. Here was an assembly duly summoned; one candidate was named; no *other* was named; the poll was taken; they had no right to stop in the middle of the election, nor could the protesters stop the election of Seagrave, when once entered upon, in any other way than by voting for some *other* person, or at least against *him*: whereas here they had only protested against any election at that time.

IN the case of the King and Monday (*a*), it appeared, that on the 3d of May, 1775, there were only a mayor and five aldermen, the seven remaining offices being vacant by death; that, on that day, the mayor and four of the five subsisting aldermen, assembled for the purpose of electing seven burgessees to fill up the vacancies, the fifth being absent, and residing without the reach of summons: that previous to any election being had, three of the aldermen protested against the meeting. That the mayor called on these three to nominate proper persons to fill up the vacancies, which they then omitted to do; on which the mayor and the other alderman delivered in a list of seven persons, of whom the defendant Monday, who was duly qualified, was one; that the mayor and this alderman, so met, elected these seven: but that the other three protested and voted *against* them. That Monday was placed first on the list, as being the properest person to be senior alderman. That the three protesting aldermen then delivered in a list of seven *other* burgessees; on which the mayor and the other alderman made an objection to three of these seven for not having taken the sacrament; and to three others for non-residence; both which grounds of objection were known to the three protesting aldermen at the time of the election. That in other respects the above six persons were all duly qualified, and that Godwin, who was the seventh, was qualified in every respect whatever.

IN support of the election of Monday, it was argued that two requisites were necessary to make a good election; a capacity in the electors, and a capacity in the elected; and that unless both concurred, the election was a nullity. With respect to the capacity of the electors, their right was this: they could not say there should be *no* election;

(*a*) Cowp. 530, vid. vol. 1, 409.

but

but they were to elect; that therefore, though they might vote and prefer one person to fill an office, they could not say that such an one should *not* be preferred; or by merely saying, "we dissent to every one proposed," prevent any election at all. That their right consisted in an *affirmative*, not a *negative* declaration: consequently there were no effectual means of voting *against one* man but by voting *for another*: and that even then, if such other person were unqualified, and the elector had notice of his incapacity, his vote would be thrown away.—In support of this reasoning were cited the several cases above mentioned (a); and then it was urged, that here it was expressly found, that the three knew of the incapacity of the *six* persons to whom the objection was now made, and that therefore their votes as to them were entirely thrown away: and that consequently the right of election being in the majority of the mayor and aldermen for the time being, and such majority having met, the assembly was duly constituted, and the election of the defendant, though by a minority, was clearly a good election.

LORD Mansfield, in delivering the opinion of the court, expressed himself to this effect. "There are different kinds of elections; elections of members of parliament, verderors, corporators, &c. and different questions may arise out of each. Therefore they must not be confounded together, and the present case must stand upon its own circumstances. On the election of a member of parliament or a verderor, where the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time, there must be a candidate or candidates: and in that case,

(a) Regina v. Boscawen. Rex v. Withers. Taylor v. mayor of Bath; and Oldknow v. Wainwright.

there

there is no way of defeating the election of one candidate proposed but by voting for another. BUT IN THE BUSINESS OF CORPORATIONS IT IS A DIFFERENT THING.

“THIS is a motion in the shape and under the name of a proposal made to the *body* by the mayor, who is the presiding officer, with the concurrence of one of the aldermen. But the essential part is, that it is made by the *mayor*, and he proposes *seven* persons together in one list, to fill up seven vacancies. The question put, upon these persons so proposed, is not, *which* of them shall be elected aldermen, but whether the *seven* shall be aldermen? The only answer to be given to such a question is *yes* or *no*. Suppose he had put it upon an individual. *I propose J. S. Is it your pleasure that J. S. shall be chosen alderman?* The answer must have been *yes* or *no*. It is not a question *which* of *two* candidates shall be preferred: but whether these *seven* persons so proposed shall be chosen. Upon that motion there is a majority *against* them, both in *substance* and *form*. *That makes an end of the whole, and renders it unnecessary to go into the rest of the case.* But I will just observe upon it. What sort of an election is this, where the mayor proposes *seven* persons at once? The electors might be inclined to vote for one, two, or three of them, and against the others; therefore they ought to have been put up in a regular way, and polled for *one* by *one*, and *yes* or *no* said to the proposal of each respectively. Such a complicated case never existed before. And what have the majority in fact done? They have voted for *one* who is clearly well qualified and duly chosen. So indeed are *three* more, to whom, in fact, there was no solid objection; for non-residence is no objection under this charter.—Upon the whole, my opinion is, that the election of
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the defendant cannot be supported; for there are clearly *four* of the other list duly elected. His possession, therefore, is both against *their right*, and against the opinion of the majority."

THIS judgment is open to some remark. It was not contended on the part of the defendant, that he *alone* was duly elected, or that he had a right to the office in *preference* to *every one* of those in the opposite list; the whole course of the argument was founded on the admission of the right of the protesting aldermen to carry the *whole* election, and to *exclude* the defendant, if they exercised it on *proper* objects. It admitted the election of Goodwin to be good, and that he had a previous right to Monday. It *admitted*, likewise, that if the other *six* had been duly *qualified* to be elected, Monday's election was void. It admitted further, that if the objection to any of these six, for the *want* of qualification, was ill founded, they were to be preferred to the defendant: but it contended that the election of the latter was good, if the objection to *any* of the six was well founded: that objection was well founded as to three: the defendant, therefore, according to the real scope of the argument, was duly elected to the *fifth* place. This was not against the *right* of the other *four*, however it might be against the opinion of the *majority* of the electors. And as the votes of that majority were thrown away on *three* unqualified candidates, the defendant, according to the principle which had obtained in *all* the *former* cases on the subject, was duly elected, though by the minority.

In the case of Oldknow and Wainwright, Lord Mansfield *almost* admits the principle, "that there is no way of defeating the election of *one* candidate but by voting for another;" for he says, "the protesters could not stop the
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election of Seagrave, when once entered upon, in any other way than by voting for some *other* person, or at least *against him*." He here supposes some middle case between that of voting for the person proposed, and that of voting for some *other* person; but what is the nature of that middle case it seems difficult to conceive; for after having qualified the general proposition by the words, "or at least *against him*," he immediately adds, "whereas here they had *only* protested against any election at that time." Now I cannot conceive in what manner a man can vote *against* a candidate but by voting for another, or by *protesting* against *any* election at all. Till the case of the King and Monday, therefore, it seems to have been acknowledged as a *general* principle, "that there was no way of defeating the election of *one* candidate, but by voting for *another* supposed to be duly qualified."—And as to all elections but those of corporations, it is in that very case admitted to its full extent. "But in the business of corporations," says Lord Mansfield, "it is a different thing;" and, after stating the circumstances of the case, he says, "it is not a question *which* of *two* candidates shall be preferred: but whether these seven persons, so proposed, shall be chosen. Upon that motion there is a *majority* against them both in *substance* and *form*. That makes an end of the whole, and renders it *unnecessary* to go into the rest of the case." He means evidently to make a distinction between elections in corporations and other elections, and to say, that in the former there is a way of defeating the election of one candidate, *without* voting for another, which must be by protesting against *any* election; and, in fact, the circumstance on which his lordship founds his judgment, amounts to no more than a protestation against *any* election; for although the

the protestors *did* vote for others, his lordship throws that circumstance out of the case, and says, "that on the motion whether the seven persons proposed shall be chosen, there is a *majority* against them both in substance and form; and that it is *unnecessary* to go into the *rest* of the case, because this circumstance alone puts an end to the whole question."

THIS distinction between elections in corporations, and *other* elections, seems to have been taken, for the *first* time, in this case of the King and Monday; and it may be remarked, that the principle on which it is founded is inapplicable to *many* cases of elections in corporations. "On the election of a member of parliament or a verderor," says his lordship, "where the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time, there *must* be a candidate or candidates; and in that case, there is no way of defeating the election of *one* candidate proposed but by voting for *another*. BUT IN THE BUSINESS OF CORPORATIONS IT IS A DIFFERENT THING."

I APPREHEND, that in the business of corporations, as well as in every other case, there can be *no* election at all, unless there be a candidate or candidates; and in the case of the election of a mayor, or other head officer, on the charter-day, or in the case of an election of an alderman by the wardmote, as in the city of London, or where the electors are commanded by *mandamus* to elect *any* officer whatever of a corporation, "the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time."—The only case to which this distinction can apply, appears to me to be that of a mere *voluntary* election on a bye day, to fill up a vacancy which might, at the discretion of the electors, be filled up at *any* time.

It has been remarked (*a*), "that in corporations by prescription, the time and manner of election, and the qualifications, both of the electors and of the persons capable of being elected, depend *principally* on custom; and in corporations by charter, on the provisions of the charter." This qualification of the proposition was introduced with a view to the inherent power which corporations have with respect to the regulation of their internal concerns; for, though it be true that all these circumstances depend *principally* on custom or charter; yet, so far as may be consistent with the constitution of the corporation, whether by charter or prescription, these may all be regulated by bye laws.

THE case of Machell and Nevinson, mentioned in the preceding volume (*b*), is an instance of the power of a corporation to regulate the *time* of election, where that time is not absolutely fixed to a particular day, by charter or custom: there it appeared, that previous to the year 1674, the members used to be summoned to meet to choose a mayor, by order of the old mayor, some time about Michaelmas, but not on a fixed day: on May 26th, 1674, an order was made by the mayor, aldermen, and common councilmen, that they should for the future meet on the *Monday* before Michaelmas day every year to choose a mayor, under a penalty to be inflicted on every one who should wilfully absent himself.—To which regulation no objection was made.

OF the power of a corporation to regulate the *manner* of election, when no particular mode is established by charter or prescription, it will be sufficient to state, as an example, a case which lately occurred in the town of Cambridge on the election of a mayor (*c*).—This came before the court on a special verdict, found on two

(*a*) Ante, page 2.

(*b*) Vol. 1, 434. 2 Ld. Raym. 1355.

(*c*) Newling v. Francis, 3 Term Rep. 189.

issues, which had been directed to try the right of the plaintiff or the defendant to the office.—The first count stated the plaintiff's mode of election, which was this: the names of all the common council of the borough, present at the election, were to be first written on several pieces of paper and laid upon the table; the mayor and his assistants were to elect two aldermen to inclose the names in balls of wax, and put the latter into a box; the mayor and his assistants were also to appoint one other alderman to take out one of the balls for the bench; and the commonalty were to take out one other ball; those whose names were inclosed in the balls so taken out, were to choose twelve burgesses, three for each ward within the borough; these twelve being first sworn, were to choose six other burgesses, two out of two of the wards, and two out of each of the others; and those eighteen burgesses so chosen and sworn, were, within an hour, to choose a mayor, bailiff, and counsellors of the borough.

THE second count stated the defendant's mode of election; which was, that the mayor and his assessors or counsellors should elect one of the commonalty, and that another of the commonalty should be elected by the commonalty; which two being sworn, should elect twelve men of the commonalty, which twelve should choose six more of the commonalty; and that those eighteen, in the presence of the commonalty, should swear, that they would choose a certain fit mayor to govern the town, four bailiffs, and four counsellors; and that the two who chose the twelve, should not be part of the eighteen in the election.

THE special verdict found in substance; that Cambridge was a borough by prescription, by the name of Mayor, Bailiffs, and Burgesses; that there had not been any one uniform and certain mode of election to these offices used

and established in the borough from time immemorial ; but that it had from time to time been ordered and directed by bye laws for that purpose made by the body at large. It then stated a bye law made in the 18 Ed. 3, for the election of mayor, bailiffs, and counsellors, as set out in the second count of the declaration ;- which was followed till the 10th of Elizabeth, when the bye law, prescribing the mode of election, stated in the first count, was made ; and that this latter mode was used from that time till the granting of a charter in the 36 Car. 2, which directed, that the mayor and other officers should be elected in the same manner as had been accustomed for twenty years past. The verdict stated further, that this charter was granted, in consequence of a surrender, by deed, of all the franchises of the corporation concerning the election of mayor and other officers ; but that the deed had never been enrolled of record : that the mode of election, which had been used for twenty years before the granting of this charter, was used till the 4th of James 2, who then issued a proclamation restoring all those corporations to their former situation, who had surrendered their charters, but of which the deeds of surrender had not been enrolled of record : that the corporation of Cambridge had acted in conformity to the proclamation ; and that in the year 1786, a bye law had been made establishing the mode of election of the defendant set out in the second count.

It was contended that, notwithstanding the proclamation, the charter of Charles the second was still in force, and that consequently the bye law of 1786 was void ; for, that a corporation could not change its constitution, as to the election of officers, where it was regulated by charter or a prescriptive usage ; though, if the charter or usage
were

were silent, as it was incident to a corporation to perpetuate themselves, they might make bye laws to regulate the election of their officers. Here the charter of Charles the second had directed the mode of election to be as it had been for twenty years before; and the power of making bye laws was only given in a general clause among other things: but it could not be supposed to have been the King's intention to give the corporation a power of undoing, by a bye-law, that which was the chief object of the charter.

THE court were of opinion, that the proclamation, and the corporation's having acted under it, put the charter of Charles the second out of the case, and that the bye law of 1786 was good; for though it was admitted that bye laws could not alter the constitution, they might regulate the manner of election, if they did not infringe the charter: here it was expressly found that the mode of election was not regulated by any charter or prescription, but that it had varied from time to time. The same power, therefore, which enabled the corporation to make the former bye law, also enabled them to substitute another in its room.

It was added (*a*), that it might be a considerable question, whether this bye law of 1786 would not have been good, even if the charter of Charles the second had stood; in the mode of election established by the bye law, to which the charter of Charles the second referred, much was left to chance, which the bye law of 1786 removed; and as that did not alter the constitution, but only the mode of election, it probably would not be bad, even if the charter of Charles the second had still continued in force.

(*a*) By Buller J.

WITH respect to the qualifications of the electors and of the eligible, it has been laid down (a) as a general proposition, that a bye law may limit the number of the former; but not the number of the latter: because a limitation of the number of electors tends to prevent the confusion naturally attendant on popular elections; a reason which does not in so great a degree apply to the case of the eligible: but neither branch of this proposition is to be taken in the full extent of the words in which it is expressed; for neither is every bye law good which limits the number of electors, nor every bye law bad which limits that of the eligible.

WITH respect to the latter, though a bye law would be void, which should require an additional qualification beyond those required by the constitution of the corporation, or which should transfer the right of being elected from a more numerous body, to a body of a more select description; yet a bye law, requiring the nomination of a particular number of candidates, out of the whole number of the persons eligible, and that the election should be of one of the candidates so nominated, would be good.

THUS where it appeared, that Edward the third granted by charter to the burgesses of Dartmouth, the privilege of electing from among themselves a mayor every year; that by particular constitutions made in the reigns of Queen Elizabeth and King James, and long usage in conformity to those constitutions, the common council had proposed two persons to the freemen, of whom the latter chose one; but that, in 1681, a bye law had been made repealing all

(a) In the case of Philips, mayor of Carmarthen, Trin. 1749, 22, 23 G. 2, B. R. cited 3 Bur. 1833, 1836, 1838. Lee v. Wallis et al', 27 Jan. 1756, cited 3 Bur. 1833.

former bye laws, and enacting, that for the future, elections should be made without the previous nomination of particular candidates: the court held, that, though by the grant of Edward the third, the election was to be from the freemen at large, yet it might be restrained by bye laws and usage, to the choice of one out of two proposed by a select body; but that the bye law of 1681 had well restored the constitution to its primitive state (*a*).

So, where it appeared by a special verdict, that by charter, the mayor of the borough of Macclesfield was to be chosen *by* the capital burgessees *out* of the capital burgessees, who consisted of twenty-four; that for fifty years past, by an usage founded on a bye law which was not, at the time of the verdict, extant in writing, the *common* burgessees had put *five* of the *capital* burgessees in nomination, out of which five the capital burgessees had chosen one to be mayor; that there were no traces before these fifty years of any election in any other manner: and that, in the present case, the common burgessees had met on the charter day, and put in nomination eight capital burgessees, of whom the plaintiff was one, and had the majority of capital burgessees in his favour: the court held the usage to be good, as it had a tendency to prevent popular confusion; but that the election of the plaintiff was void, because it pursued neither the charter nor the bye law: it did not pursue the charter, for that directed the election to be out of the capital burgessees at large, and here the number was confined to eight; and it did not pursue the usage, because more than five were nominated, which might produce that confusion against which it probably was the intention of the bye law to provide (*b*).

(*a*) Salk. 190, 191.

(*b*) Barber v. Boulton. 1 Str. 314.

BUT,

BUT, in the case of Tucker, mayor of Weymouth, where it appeared that the charter directed the election to be made out of four persons to be nominated out of the burgesses or inhabitants at large, and that a bye law made by the mayor and aldermen directed it to be made out of four persons to be nominated out of the aldermen, or of whom one at least should be an alderman; the court of King's Bench held this bye law to be void, and on a writ of error the house of lords affirmed the judgment (a).

WITH respect to the electors, though a bye law restraining their number may be good, yet that restraint must be within certain limitations: It cannot strike off an *integral* part of the electors; nor transfer the right of election from the body at large to a *select* number *independent* of that body; nor impose a qualification inconsistent with the charter, or unconnected with their corporate character.

THE first remarkable case on this subject, is "the case of corporations" in the 40 and 41 El. (b) of which the substance was this—Several cities and towns had been incorporated by charters which directed the election of mayor, bailiffs, aldermen, and other principal officers, to be by the commonalty or burgesses indefinitely: by long continued usage, these elections had been made by a select number of the principal persons of the commonalty or burgesses, under the name of common council, or some similar denomination, and not by the commonalty or burgesses at large, or so many of them as chose to be present at the elections: several attempts had been lately made, in some corporations, in opposition to this ancient usage, to intro-

(a) Rex. v. Tucker, mayor of Weymouth, Pasch. 14 G. 2, cited 3 Bur. 1835.

(b) 4 Co. 78. Jenk. 273.

duce popular elections; on which the lords of the council thought it of importance to submit this question to the judges, "whether the elections made according to the ancient usage were good in law, notwithstanding the terms of the charters, which gave that privilege indefinitely to all the commonalty?" and it was resolved by the justices, says Lord Coke, "upon great deliberation and conference had among themselves, that such ancient and usual elections were good and well warranted by their charters, and also by the law; for in every of their charters they have power given them to make laws, ordinances and constitutions, for the better government and order of their cities or boroughs, &c. by force of which, and for avoiding of popular confusion, they, *by their common assent*, constitute and ordain, that the mayor or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty, or of the burgesses, *and prescribe also how such selected number shall be chosen*; and therefore such ordinance and constitution was resolved to be good, and agreeable to the law and their charters, for avoiding of popular disorder and confusion: and although now such constitution or ordinance cannot be shewn, yet it shall be presumed in respect of such special manner of ancient and continual election (*which special election could not begin without common consent*), that at first such ordinance or constitution was made."

Two observations occur on this case. First, That the bye law confining the election to a select number of electors, was presumed to have been made by the *common assent* of the *whole* corporation, by virtue of the *inherent* power of corporations to make bye laws, and not by a select body *expressly* empowered to make bye laws by the provisions of the charter: Secondly, That the select number, to whom

whom the power of election was supposed to be delegated, were presumed to be the *representatives* of the *whole* body chosen in the manner prescribed by the bye law itself, for the *specific* purpose of the election; and not a *distinct* body appointed by the charter, and *independent* of the commonalty at large.

THE case in which the general proposition was established, "that the number of *electors* may be restrained by a bye law; but that a bye law cannot *narrow* the number of the persons *out of whom* the election is to be made," is that of Philips, mayor of Carmarthen, which occurred in 1749, and was followed by that of Lee and Wallis in 1756 (*a*); but of neither of these cases are we acquainted with the particular circumstances, as they do not appear to be anywhere particularly reported: of the latter, we only know that it confirmed the proposition which had been established in the former; with respect to which all that we can collect from the different places in which it is cited (*b*), is that, though it was asserted on the one hand "that the common council were chosen out of the burgesses, and not out of the commonalty at large, and had never been part of the commonalty," it was affirmed on the other, "that there was no common council *distinct* from the commonalty, and as a select body;" that the bye law on which the question arose was made by the *whole* body; and that on one side it was said to have been held, "that a bye law could not exclude an *integral* part of the electors," while on the other hand, it was asserted, "that that question was not determined." But what were the terms of the bye law, or the circumstances of the election of which the validity was contested, we are not told.

(*a*) Vid. ante, p. 24. (*b*) 3 Bur. 1833, 1835, 1836, 1838, 1839, 1840.

THE case in which it was finally decided "that a bye law cannot exclude an *integral* part of the electors, nor impose a qualification inconsistent with the charter, or unconnected with their corporate character," was that of Spencer, common councilman of Maidstone, of which the circumstances were these: by a charter, bearing date 17th of June, 21 G. 2, the corporation of Maidstone was to consist of a mayor, thirteen jurats, including the mayor, forty common councilmen, and commonalty; the election of the mayor was to be by the jurats; of the jurats, by the mayor, jurats and common councilmen, exclusive of the commonalty; and of the common councilmen, by the mayor, jurats, and commonalty, including the common councilmen, out of the principal inhabitants of the town and parish; and power was granted to the mayor, jurats, and common council to make bye laws.

UNDER this power the mayor, jurats, and common council, on the 18th of August, 1764, made a bye law, "That on every future election of common councilmen, the mayor, jurats, and common council for the time being, and such of the common freemen for the time being, who should reside in, and should respectively have gone through and served, for the space of one whole year respectively, the several offices of churchwarden and overseer of the poor, respectively, for the said town and parish, or the major part of such mayor, jurats, common councilmen, and common freemen *qualified as aforesaid*, should assemble themselves together in the court hall of the said town and parish; and being so assembled—should by themselves, without the presence or concurrence of any of the commonalty of the said town and parish, elect one or more of the principal inhabitants of the said town and parish to be a common councilman or common councilmen of the said town and parish."

THE

THE defendant justified his acting as a common councilman on an election under this bye law, and had a verdict in his favour; and the question of the validity of the bye law came before the court on a motion in arrest of judgment.

THE court were of opinion, that this case was not to be compared to those, in which there was a common council supposed to have been created by the commonalty, and therefore possessing the original power of the latter; because the charter having expressly constituted the common council, they were to be considered as a distinct body, independent of the commonalty, who therefore formed an *integral* part of the electors appointed by the charter; for which reason, had the bye law confined the right of election to the mayor, jurats, and common council, it would have been clearly void: it had not, indeed, done that, but it had excluded such of the commonalty as did not possess a qualification which had no connection with their corporate character, and which was not required by the charter: it confined the right of voting to such as had served for one whole year the offices of churchwarden and overseer of the poor respectively: this put the whole power of election in the makers of the bye law themselves, and in persons who had no connection with the corporation; for the parson had the nomination of at least one of the churchwardens, and the makers of the law themselves had the appointment of the overseers, because some of the jurats were borough justices by their office, and had an exclusive jurisdiction (*a*). In those cases, in which a bye law, confining the right of election to a select number, would be good, an usage to the same effect, of however long continuance, if unsupported by a bye law, would be void (*b*).

(*a*) *Rex v. Spencer*, common councilman of Maidstone. 3 Bur. 1827—1840.

(*b*) *Rex v. Tomlyn et al'*, B. R. H. 316.

WHERE, by custom or by charter, a particular day was appointed for the election of a magistrate, by common law the election must have been on that precise day; and in the case of a custom, if the plaintiff in a declaration for a false return to a mandamus, had laid the day of his election right, but at the trial had proved it to have been on a different day, he would have failed in his action, because he did not bring his election within the custom: but if he had laid a *wrong* day in the declaration, and proved an election on the *right* day, he would have maintained his action, provided the day laid in the declaration had been before the action brought, because the day laid was not material to the custom (*a*).

By the statute of 11 G. 1, c. 4, after reciting "that, in many cities, boroughs, and towns corporate, the election of the mayor, bailiff or bailiffs, or other chief officer or officers, was, by charter or ancient usage, confined to a particular day or time, without any provision how to act or proceed, in case no election were then made; and that it frequently happened, that by charter or usage, particular acts were required to be done at certain times, in order to complete such elections, and that by the contrivance or default of the person or persons who ought to hold the court, or preside in the assembly where such elections were to be made, or such acts to be done, or by accident, it had sometimes happened, and might frequently do so, that no courts or assemblies had been held, or elections made, or such acts done within the time fixed for that purpose; in which cases, if elections of such officers could not afterwards be made or completed, or if in consequence of such omission, the corporation should be dissolved, great mischiefs might ensue:" it was enacted, "that if in any city, borough, or

(*a*) Vid. Carth. 228.

town corporate, no election should be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough or town corporate, on the day or within the time appointed by charter or usage for such election, or *such election being made, should afterwards become void*, whether such omission or avoidance should happen through the default of the officer or officers who ought to hold the court, or preside where such election was to be made, or by any accident or other means whatever, the corporation should not thereby be deemed or taken to be dissolved, or disabled from electing such officer or officers for the future: but that in any case where no election should be made as aforesaid, it should and might be lawful for the members or persons of such city, borough, or corporation, who had right to vote or be present at, or to do any other act necessary to be done, in order to or for the completing of such election, and they or such of them as should not be hindered by any reasonable impediment or excuse, were thereby required, respectively, to meet or assemble together in the town hall, or other usual place of meeting, for making such election, within such city, borough, or town corporate, on the day next after the expiration of the time within which such election ought to have been made, unless such day should happen to be Sunday, and then upon the Monday following, between the hours of ten in the morning and two in the afternoon of the same day; and that the members or persons having right to vote at, or to do any other act necessary to be done in order to such election, or such of them as should be so assembled or met together, should forthwith proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers for such city, borough, or corporation, and to do every act necessary to be done, in order to or for the completing of such election, in such manner as was usual in, or in order to

to the election of such officer or officers, on the day or within the time appointed by charter or usage for such election; and that in case upon such day of meeting, thereby appointed for such election, the mayor, bailiff or bailiffs, or other proper officer or officers, who ought to have held the court, or presided at the assembly for such election, or doing any other act necessary to be done in order to such election, if the same had been made or done on the day fixed, or within the time limited by charter or usage for that purpose, should be absent, then such other person having a right to vote, being the nearest then present in place or office to the person or persons so absenting himself or themselves, should hold the court or preside in the assembly, and should have the same power and authority in all respects therein, as the mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough, or town corporate, at any court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election" — s. 1.

"PROVIDED always, that no such election, nor any act done in order thereunto, should be valid, unless as great a number of persons having right to be present at, and vote therein, should be present at the assembly holden for such purpose, and concur therein, as would respectively have been necessary to be present, and concur in such election or act in case the same had been made or done upon the day, or within the time appointed for that purpose by the charter or usage of such city, borough, or corporation, saving only, that the presence of the mayor, bailiff or bailiffs, or other chief officer or officers who ought to preside should not be necessary" — s. 5.

AND it was further enacted, "that if any mayor, bailiff or bailiffs, or other chief officer or officers of any city,

borough, or town corporate, should voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, bailiff or other chief officer in the same city, borough, or town corporate, upon the day or within the time appointed by charter or ancient usage for such election, the person or persons so offending, being thereof lawfully convicted, should, for every such offence, suffer imprisonment for the space of six months without bail or mainprize, and should be for ever disabled to take, hold, or exercise any office belonging to the same city, borough, or corporation"——s. 6.

AND it was further enacted, " That if it should happen that no election should be made of the mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, on the day or within the time appointed by charter or usage for that purpose, and that no election of such officer or officers should be made pursuant to the directions before prescribed, or *such election being made should afterwards become void*, in every such case it should and might be lawful for his majesty's court of King's Bench, on motion to be made in the said court, to award a writ or writs of mandamus, requiring the members or persons of such city, borough, or town corporate, having a right to vote at, or to do any other act necessary to be done in order to such election respectively, to assemble themselves on a day and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers, as the case should require, and to do every act necessary to be done in order to such election, or to signify to the said court good cause to the contrary, and thereupon to cause such proceedings to be had and made, as in any other cases of writs of mandamus granted by the said court for election of officers of corporations;

porations; and of the day and time appointed in and by any such writ or writs of mandamus for holding such assembly, public notice in writing should, by such person as the said court should appoint, be affixed in the market-place, or some other public place within such city, borough, or town corporate, by the space of six days before the day so appointed, and such officer and other person respectively, should preside in such assembly, as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same had been made or done on the day in the former part of the act prescribed for that purpose"—s. 2.

AND after reciting, "that in certain boroughs and towns corporate, the mayor, bailiff or bailiffs, or other chief officer or officers, was or were to be nominated, elected, or sworn at a court leet, or view of frankpledge, or some other court, and that by reason of the contrivance or default of the lord or his steward, or such other officer by or before whom such court ought to be held, in not holding the same, or by some accident, it had happened, and might thereafter happen, that no due nomination, election, or swearing of such mayor, bailiff or bailiffs, or other chief officer or officers had been or might be had or made;" it was further enacted, "that it should and might be lawful for his Majesty's court of King's Bench, on motion to be made in the said court, to award a writ of mandamus, requiring the lord or his steward or other officer, by or before whom such court ought to be held, to hold, or cause to be holden, such court leet or other court, and to do every other act necessary to be done by him in order to such nomination, election, or swearing, at such day and time as should be for that purpose judged proper by the said court of King's Bench, and should

be appointed in such writ, or to signify to the said court good cause to the contrary, and thereupon to cause such proceedings to be had and made, as in other cases of writs of mandamus granted by the said court, for holding of any court; and of the day and time appointed in and by any such writ of mandamus for holding such court, public notice in writing should, by such person as the said court of King's Bench should appoint, be affixed in the market-place, or some other public place within such borough or town corporate, by the space of six days before the day so appointed: and that where a nomination of persons, in order to the election of any such mayor, bailiff or bailiffs, or other chief officer or officers, was to be made at such court leet or other court, in every such case, after such nomination made, all and every other act and acts necessary to be done in order to such election, should be had, made and done at such assembly, and in such manner and form as the same ought to have been had, made and done, in case such election had been made on the day next after the expiration of the time prescribed for such election by the charter or usage of such borough or corporation, according to the directions before mentioned in the act" —s. 3.

ON this statute it has been frequently determined, that the power of the court to grant a mandamus to go to an election, is not confined to the case where there has been no election at all: but that where there has been an election in point of fact, yet, if from the circumstances laid before the court, it shall appear clearly that the election cannot be supported, a mandamus shall issue; but that if the election appear doubtful, no mandamus shall issue, till the person actually exercising the office, be ousted by judgment in quo warranto.

THE first case we find reported on this subject is that of Boffiney, otherwise Tintagel, in Cornwall, which occurred in

in the 8 G. 2 (*a*); and in which the application for a mandamus to go to the election of a mayor, was opposed, on the ground, that on the usual day one Robins was chosen and sworn into the office; and it was therefore contended, that as there was an actual officer, he ought to be ousted before a mandamus should be granted. But the court, on consideration, held that the writ ought to issue; the words of the act being, "if no *due* election be made," and Robins not having the shadow of a right:—The intention of the act, they said, was to give the corporation a rightful officer as soon as possible, whereas this pretence would waste the whole year: they did not, however, lay this down as a general rule; but said that these writs were discretionary, and that they might refuse the application, where there was a *probable* election and room to doubt.—They added that, in the present case, no harm was done, because this was not a *peremptory* mandamus, and it might be returned that there was a rightful officer (*b*).

In a case (*c*), which occurred the next year, Lord Hardwicke mentioned this case of Tintagel as the *only* case in which such a *mandamus* had been granted; and he said the reason of it was, that it was quite a *clear* case, and the corporation was without a mayor: otherwise, he said, it would *not* have been granted.

In the report of another case (*d*), in the same year, the same chief justice is reported to have said, "that this was

(*a*) Case of the Borough of Boffiney, *alias* Tintagel, in Cornwall.
2 Str. 1003.

N. B. It is not the first case of a mandamus to go to the election of a mayor; but the first where there had been an actual election. Vid. Andr. 279.

(*b*) Qu. Whether the latter observation will not apply to *every* case?

(*c*) Rex v. Holmes, H. 9 G. 2, B. R. cited 3 Bur. 1454.

(*d*) Rex v. corporation of Oxford, M. 9 G. 2, B. R. H. 178.

a remedial law, and that therefore the court should make it as effectual as the words, or any construction of them could warrant; and that the court had always made a liberal construction of them: and to have mentioned the case of *Tintagel* as an example.

IN a case about five years after this (*a*), it was held, that though it appeared in point of fact, that there was an election, yet if on considering the circumstances, there was good reason to think it void, the court would award a mandamus to go to a new election, and not wait the event of any controversy about the former.

IN the case of the common councilmen of Carmarthen (*b*), this point was more solemnly determined.—It appeared, that on the day after the charter day, one J. S. was elected mayor by the burgesses at large; but that J. N. who presided at the election, was not the next person in rank or office to the mayor of the preceding year. The Chief Justice (*c*), in delivering the opinion of the court, observed, that it had been said, that the court was only empowered by the statute to award a mandamus, “where it shall happen that *no election* of a mayor, or other chief officer of a city, borough, or town corporate shall be made upon the day, or within the time appointed by charter or usage for that purpose; or where *no election* of such officer shall be made pursuant to the directions of this statute; or such election being made, shall afterwards become void;” and that it had been inferred, that as there had been, in the present case, an election in point of fact, of a mayor, and that election was not yet determined to be void, the court could not award a mandamus to proceed to a new election.

(*a*) Case of *Aberystwith*, 2 Str. 1157, Tr. 14 G. 2.

(*b*) *Rex v. Newsham et al'*, common councilmen of Carmarthen. Sayer 211. Vid, vol. 1, 403.

(*c*) *Ryder*.

But he said, the court were of opinion, that the words "no election" in the statute, ought to be construed "no legal election;" and that consequently, though there had been an election in fact, the court had a discretionary power, on considering all the circumstances of the election, to award or not to award a mandamus, as the justice of the case might require: that if, on all the circumstances of an election in fact, the legality of it were doubtful, the court ought *not* to award the writ, it being proper, in such a case, that the legality of the election should be tried in an information in the nature of quo warranto: but that if upon all the circumstances of an election in fact, it appear clearly to be illegal, the court ought to award the writ, because it would be nugatory to try the legality of it in that way. The election, in the present case, was clearly illegal, because the person who ought, by the directions of the statute, to have presided at it, did *not* preside—and therefore the mandamus was awarded.

ON the authority of this and the preceding cases, was decided that of Cambridge (*a*), of which the circumstances were these:—On the charter day they had in fact chosen a person to be mayor; but it appeared that he was an officer of the army just gone to North America, and that there was not the least probability of his returning before the expiration of the year. The court held this to be merely a *colourable* election which could not be supported; and therefore, on the principles laid down in the case immediately preceding, awarded a mandamus to go to a new election.

It is no objection, that the application is not made within the year,——On this point Lord Hardwicke, in a

(a) Rex v. Mayor, &c. of Cambridge, 4 Bur. 2008, vid. vol. 1, 339.

case before mentioned (*a*), expressed himself to this effect; "that, whatever might be the *intention* of the act in this respect, there were no *words* to confine the application for a mandamus to the year; that as the *purpose* of the act was to prevent the dissolution of corporations, and to give an opportunity for the election of head officers, though the regular time had passed, he thought the mandamus should issue, though it appeared there had been no mayor, that is, no legal mayor for some years; for though there had been elections, the persons elected had been successively ousted by judgments in quo warranto informations."

In a subsequent case (*b*), which occurred in the 16 G. 2, application was made for a mandamus to proceed to the election of bailiffs, coroners, chamberlains, and the other annual officers of the corporation of Scarborough, there not having been any good officers since the year 1736; and of those who had in fact been chosen, several having had judgment of ouster against them: on considering the cases of Tintagel and Aberystwith, we are told, the court granted the application, as there was no reasonable expectation of supporting the right of the present possessors: and they granted it not only for the head officer, but also for the others, as they were necessarily constituent parts of the corporation, and equally within the reason of the statute.

BUT where there is a mayor or other officer in point of fact, he ought to be made a party to the rule to shew cause why a mandamus should not issue for a new election.—A rule had been granted, calling on John Bankes, Esq. lord of the leet for the borough, manor, or lordship of Corfe-Castle, in the Isle of Purbeck, in the county of Dorset; and also on the steward and bailiff, and deputy bailiff of the

(*a*) Rex v. corporation of Oxford, B. R. H. 178. Ante, p. 37.

(*b*) Case of the corporation of Scarborough. 2 Str. 1189.

leet and borough; and also on twenty-four other persons, who had been summoned, and ready to be returned as a jury to a former court of the leet: "to shew cause why a writ or writs of mandamus should not issue, directed to them, requiring the lord and his steward to hold a court leet, and the bailiff, or, in his absence, his deputy, to *return* and *deliver* to the said court leet the pannel or list of the jury, by the deputy bailiff summoned on the 24th of October preceding; and requiring the steward, at the court so to be holden, in the usual manner to SWEAR THE SAID JURY; and also requiring them the aforesaid jurors so impannelled and ready to be sworn as aforesaid, to be sworn in due form at the said court, and then and there to proceed to the election of a mayor of the said borough of Corfe-Castle for the present year, and to do every act necessary to be done by them *respectively* for *that* purpose, according to the form of the statute in such case made and provided."

CAUSE was not shewn on the merits; but objection taken to the want of notice to the person actually in possession of the office of mayor, who, it was said, ought in common justice to be heard in defence of his right, before the issuing of a mandamus to proceed to the election of *another* in his stead.—The court were of this opinion; and, the rule having been amended by inserting the name of the actual mayor, cause was afterwards shewn against making the rule absolute.—On which occasion Lord Mansfield proposed, that the counsel for the defendants should file their affidavits, that the prosecutor's counsel might be able to judge whether, on the affidavits on both sides compared together, it was a *doubtful* election, and fit to be tried on an information in nature of quo warranto, or whether it was a mere *colourable* election, and clearly void: for that, if the former should prove to be the case, the court ought

not

not to grant the mandamus; if the latter, they *ought*.—The counsel for the prosecutor intimated, that if he should find that the election was *doubtful* or *questionable*, he would pursue the rule no further, and afterwards, having read the affidavits, gave it up (a).

LORD Mansfield further observed in this case, that the rule, as it stood, confining the mandamus *specially* to the *very individuals* who were summoned on the 24th of October, was certainly wrong. So that it could not be made absolute in that form.

ON the third section of this statute, a mandamus will lie, commanding the proper person to hold a court leet, in order that a *particular* person may be presented and sworn into any of the offices within the intent of the statute, on a suggestion of his having been duly elected.

THIS appears from the case of the King and Willis; which was an application for a mandamus, to be directed to the defendant as steward of the court leet for the borough of Christchurch, in Hampshire, commanding him to hold a court leet, and to swear and charge a jury to present all things proper to be presented, in order that they might present to the steward John Dale, the person duly elected mayor of the borough. In support of the motion an affidavit was produced, stating the constitution of the borough, and that Dale had been elected mayor.—In opposition to the application an affidavit was read, stating the election of another person to the office: and it was contended, that on the section which was made the foundation of the motion, a mandamus would not lie for presenting a *particular* person, but only a *general* mandamus for holding a court leet, and doing all things necessary for the election of a mayor. It was likewise contended, that as, in the present case, there

(a) Rex v. Bankes, Esq. et al'. 3 Bur. 1452.

were two persons who pretended to have been elected, the writ for which the present application was made would predetermine the question; and would oblige the jury to present *one* person as duly elected, when perhaps their opinion might be in favour of another. But the whole court were clearly of opinion that the application was proper; for that the plain intent of the act, which was very general, was to enforce the performance of all such acts as were necessary for completing the admission or election of the officers or members of corporations, one of which was a presentment: and as it was sworn that Dale had been elected, there could be no harm in pointing out by the writ, what in particular the steward and jury, who were merely ministerial, were further to do: this could be of no prejudice to any one; because the mandamus not being peremptory, if Dale was not well elected, that, or any other matter against the suggestion in the writ (*a*), might be returned; and then the question would be put in a proper method of trial (*b*).

AT common law, when the day appointed by the constitution of a corporation for the election of a *new* mayor, was the day on which the *old* went out of office, the latter had no power to adjourn the election from that to the subsequent day, unless he had a power of holding over; and if, in fact, he had made such an adjournment, an election, completed at the adjourned meeting, would have been void: but this inconvenience seems to have been remedied by this statute: the *principal* intent of it, indeed, was certainly to enable corporations to proceed to an intirely *new* elec-

(*a*) The report says, "any other matter suggested in the writ;" which, it is apprehended, cannot be correct.

(*b*) *Rex v. Willis*. Andr. 279.

tion; and it does not expressly give authority to the mayor to adjourn an election begun and not completed on the charter day; but the words of it seem general enough to comprehend this case, and the court will make a liberal construction of them; as the inconvenience arising from an election not completed, is as great as that arising from a total omission (a).

THE statute mentions some time between the hours of ten in the morning and two of the afternoon, as the time of meeting for an election to be made according to the provisions of it; but it has been held, that this is *directory* and not *restrictive*, and intended only to prevent surprise which might arise from beginning at inconvenient times; and that, therefore, where no surprise appears, an election begun or continued by adjournment, at any other time, is good (b).

DOUBTS have been expressed, whether the *same* person who ought to have presided at an election on the day appointed by the charter or usage, *may* preside at the election held on the day *after*, according to the directions of the statute (c); from the plain construction of the words of the first section of the act, it appears to me that he certainly *may*; but if he be absent, "then such other person, *having right to vote*, being the nearest *then present* in place or office to the person so absenting himself, shall hold the court and preside at the meeting."

By the the second section, "*such officer or other person respectively shall preside in the assembly*," held in obedience to a mandamus, awarded according to the directions of that section, "as ought to have presided at the election in case the same had been held on the day before

(a) Per Ld. Hardwicke in the case of *Rex v. Poole*. B. R. H. 27.

(b) Per eund. *ibid*.

(c) B. R. H. 27.

prescribed,"

prescribed," that is, on the day after the day appointed by charter or usage.

HERE a question may arise, "Whether the chief officer or officers who ought to hold the assembly on the day appointed by charter or usage, can preside at an assembly held for an election in obedience to a mandamus?"—At an assembly held according to the directions of the *first* section, the chief officer or officers may clearly preside; because it is only in case of *his* or *their* absence that the person *next in rank* is to preside, but as the words of reference in the second section are in the singular number, it may be doubted whether they are not confined merely to the latter.—I apprehend, that where the chief office of a corporation is filled by *two* persons, they are to be considered as *one* officer (*a*), and that therefore the words of reference, though in the singular number, extend to the former.

By the fourth section, the oaths are to be taken by the person or persons elected *before* the officer who shall preside at the election.

IF a person elected under a mandamus, in pursuance of this act, be *actually* sworn before the presiding officer; but on being prosecuted in an information in the nature of *quo warranto*, set forth, by mistake, a swearing according to the directions of the charter, in the case of an election on the charter day; he will not, at the trial, be permitted to give evidence of a swearing according to the directions of the statute. Such was the opinion of the Chief Baron, who tried the cause in the case of Roger Phillips, mayor of Carmarthen, which on an application for a new trial, Lord Mansfield, and the rest of the Court of King's Bench,

(a) Vid. *Rex v. Smart*. 4 Bur. 2241, and vol. 1, 428.

no authority to swear him, whether they were aldermen or held to be right; because, to have given evidence of a swearing different from that set forth in his plea, would have been to set up a title at the trial different from that under which he claimed on the record (*a*).

BUT if the person whose title is impeached, set forth an election under the statute, and a swearing *before* the person who was in fact the presiding officer, and two others; it is doubtful whether evidence of a swearing before the presiding officer only will support the plea; or whether evidence of a swearing before the presiding officer and the other two, according to the allegation of the plea, will support the title.

IN the case of the King and Jonas Malden, (*b*) the defendant pleaded an election under the second section of the act, and set forth a swearing before Charles Malden, William Smart, and John Edwick, the three senior aldermen present at the election; but did not expressly allege that Charles Malden was the presiding officer: an issue was taken on this swearing, whether Smart and Edwick, before whom he took the oath, were aldermen? The jury found that they were *not*: but they found likewise that Charles Malden was the proper presiding officer, and that the defendant was sworn before him *and* the other two.—The case coming before the court, on an application for a new trial, this, among other questions, was agitated, “whether the swearing, as set forth and proved, was a sufficient swearing within the statute?” In favour of the affirmative, it was contended, that it clearly appeared on the record, that the defendant was sworn before the *proper* person, though it

(*a*) Rex v. Roger Phillips, mayor of Carmarthen. 1 Bur. 292.

(*b*) Rex v. Jonas Malden, 4 Bur. 2135.

also appeared that he was sworn before two others who had not; so that the determination of that question did not affect the present; and the swearing could not be void for having been before two who had no authority, as well as before the *proper* person, because the law referred the act to the person who had power to do it. It was likewise contended, that the *present* case was not like that of Roger Phillips; for that the latter had set out a *defective* title; he had pleaded an *improper* swearing, and therefore could not be permitted to give evidence of a *proper* swearing which he had *not* pleaded: but here was no *defect* of title; the title was only defectively set out, and therefore the defendant was not precluded from giving such evidence as was necessary to prove it complete.—On the other side it was observed, that in the case of Roger Phillips, there was, in fact, no such swearing as was pleaded, but that here the swearing was exactly as it was alleged; which, it was contended, must be bad both upon plea and upon evidence; that the defendant ought to have been sworn *before the presiding officer* at the time when he was chosen; whereas it appeared by his own confession, that he was sworn before Charles Malden and two others in the character of aldermen, and not before Charles Malden as presiding officer; a swearing which, it was contended, no evidence could make good.—Without deciding this point, the court, on the whole of the case, granted a new trial, observing that the defendant might apply for leave to amend his plea, or not, as he thought proper (a).

IT being required that the person elected, in pursuance of this act, shall take the oaths before the person presiding at the meeting, it may be made a question, “whether the

(a) *Rex v. Jonas Malden*, 4 Bur. 2135.

person presiding can be elected?"—An information having been brought against Charles Malden, to shew by what authority he exercised the office of bailiff of Malden, he pleaded an election in pursuance of the first section of the statute, shewing, that no bailiff or bailiffs of the preceding year being present at the assembly, he himself, having a right to vote in the election, and being the *nearest then present* in place and office to the bailiffs, presided at the assembly, and was elected.—He then shewed, that after his election, and before his admission into the office, he did, at the same meeting, take the oaths before Jonas Malden, William Smart, and John Edwick, "then and there being *three other* senior aldermen of the said borough, and the *only* aldermen who were present at that meeting, beside him the said Charles Malden, and was thereupon, according to the form of the statute, admitted into the office."—The prosecutor, in his replication, took several issues, one of which was, that Jonas Malden, William Smart, and John Edwick were not, nor was any of them *next in place and office to the bailiffs*.—The defendant rejoined, that Jonas Malden, before whom, together with William Smart and John Edwick, he, the defendant, took the said oaths, was the nearest then present in place and office to the bailiffs of the said borough, except him the said Charles Malden, who was the nearest then present in place and office to the bailiffs of the said borough, and who presided at the said assembly, and who was elected and nominated to be one of the bailiffs of the said borough, as in the plea was mentioned.

To this rejoinder the prosecutor demurred; and for one of his causes of demurrer shewed, "that the said Charles Malden ought to have taken the oaths before such officer or
person

person as presided at the election, as being nearest then present at such election in place and office to the bailiffs or bailiff of the said borough for the preceding year, *not* being then present."

THE defendant having joined in demurrer, the court agreed that he was not properly sworn in before the presiding officer; and Mr. Justice Aston cited a case of the King and Nance (*a*), in which the court, after having taken time to consider, held that the fourth clause of the act is general and positive, without exception or restriction, "that the officer elected shall take the oath or oaths by law required, at the time of his admission, before *such* officer as shall *preside* at such election in pursuance of the act."—And he observed, that there the court did not, nor well could, as that case was circumstanced, enter into the question "whether the person elected could be sworn before himself?" And that it was not necessary to determine it here; because it was not *alleged* that he was so sworn (*b*).

It is to be observed, that this statute takes no notice of the power granted, by some charters, to the chief officers to hold over (*c*); but from the general tenor of it, a clause granting such a power seems to be rendered altogether useless.—On the one hand, the statute enacts, that though no election shall be made of a chief officer on the usual day, or though an election made shall be afterwards avoided, by such omission or avoidance "the corporation shall not be deemed to be dissolved, or disabled from electing such officer for the future."—But it was the *purpose* of a clause of holding over to prevent such dissolution or disability: for this purpose, therefore, such a clause is now unnecessary.—On the other hand, the statute is *general* in direct-

(*a*) Rex v. Nance, Trin. 1741. 14 and 15 G. 2. B. R.

(*b*) Rex v. Charles Malden, 4 Bur. 2130. (*c*) Vid. vol. 1, 384.

ing an election on the day after the usual day, or on a day appointed by mandamus.—But the *effect* of a power of holding over, when no election was made on the *usual* day, was to prevent an election till the return of the same day in the subsequent year, except in the case of death or removal (*a*).—The *effect* of such a power is done away by the statute. It is, therefore, both unnecessary and inefficient.

SECTION IX.

Of the power of Corporations over their members and officers.

EVERY corporation aggregate has a power necessarily incident to it, of admitting members and appointing officers, and removing them for reasonable cause, without any express grant conferring on them such a power.—It was long held, however, that the power of *disfranchisement* or *amotion* did not belong to any corporation which did not possess it by the express words of a charter, or by prescription. This opinion seems to have been first entertained in the case of James Bagg, and afterwards supported by the authority of the second resolution in that case, as reported by Lord Coke (*b*). This case came before the court on the return to a mandamus which had been awarded to the mayor and commonalty of the borough of Plymouth, commanding them to restore James Bagg to the office of

(*a*) Vid. *Rex v. Robinson*, mayor of Helston, 1 Str. 555.

(*b*) *James Bagg's case*, 11 Co. 99. a.

one of the twelve chief burgesses or magistrates of that borough.—The return, after having alleged a great many reasons for his removal, stated an order made by the mayor and *nine of the chief burgesses*, “that unless, before the next sessions after the date of the order, he should reconcile himself to the mayor and his brethren, and promise to demean himself in an orderly and temperate manner for the time to come, he should be totally removed from the bench, and a new master chosen in his room;” and then stated, that in consequence of his not having so reconciled himself, but having continued his former behaviour, he had been afterwards removed by the mayor and *commonalty* of the borough (a).

THE reporter, after stating in the *first* resolution, that the causes of removal set out in the return were held insufficient, gives the *second* in these words, “that no freeman of any corporation can be disfranchised by the corporation, *unless they have authority to do it by the express words of the charter, or by prescription*; but if they have not authority either by charter or prescription, then he ought to be *convicted by course of law* before he can be removed; and it appears by Magna Charta, c. 29, *nullus liber homo capiatur vel imprisonetur, aut disseisietur de libro tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, &c. nisi per legale iudicium parium suorum, vel per legem terræ*: and if the corporation have power, by charter or prescription, to remove him for a reasonable cause, that will be *per legem terræ*; but if they have no such power, he ought to be convicted *per iudicium parium suorum, &c.* as if a citizen or freeman be attainted of forgery, or perjury, or conspiracy, at the King’s suit, or of any other crime

(a) Lord Mansfield, in 1 Bur. 538, states this removal as having been by the *select* body of the mayor and nine of the masters.

whereby he is become infamous, upon such attainder they may remove him: so, if he be convicted of any such offence, which is against the duty and trust of his freedom, and to the public prejudice of the city or borough, whereof he is free, and against his oath, as if he has burnt or defaced the charters, or evidences of the city or borough, or rased or corrupted them, and is thereof convicted and attainted, these and the like are good causes to remove him."

THE first part of this resolution, taken by itself, is an absolute denial of the power of corporations to disfranchise any of their members, under any circumstances, "unless they have such a power by the express words of a charter or by prescription:" but the whole of the resolution put together amounts to this, "that, where they have no such express power, they cannot disfranchise a man *without a previous conviction, by due course of law*, of some offence which amounts to a reasonable cause; but, "that where they *have* such express power, they *may* disfranchise *without conviction*:" and the reason given for this distinction is, that in the *latter* case, the mere fact of removal, is *per legem terræ*, which satisfies *one* of the provisions of magna charta; but that in the former, a previous conviction is necessary to satisfy the *other*.

ON the authority of this case, however, the incidental power of disfranchisement or amotion has been frequently denied in such terms as these, "There must be a custom or a statute to warrant a disfranchisement" (a); "the corporation ought to shew a power either by custom or under their letters patent" (b); and, "a freeman shall not be removed, but by charter or prescription" (c).

(a) Yates's case, Style, 477, 480.

(b) 1 Lord Raym. 392. Rex v. mayor of Coventry.

(c) Rex v. mayor, &c. of Doncaster. 2 Ld. Raym. 1566.

IN favour of the opposite opinion we find nothing till the beginning of the reign of G. 2, but this observation of Lord Chief Baron Hale, “that every corporation *as* a corporation may take the resignation of a member, and, by consequence, for good cause may remove (a): for if a corporation have no *inherent* power to disfranchise, how can they do it even *upon request* of the corporator himself?” (b)

IN the second year of G. 2, an application for an information in the nature of *quo warranto*, was made against Lord Bruce on a supposed forfeiture of the place of recorder; recourse was had to this mode of proceeding on an apprehension, that as there was no clause in the charter empowering the corporation to remove, they had no other remedy; the court rejected the application on this principle, that if there was an actual forfeiture, the defendant was out of the office and the corporation might choose another; if there was no forfeiture, the offence stated was only a misdemeanor, for which a *quo warranto* would not lie: “Besides,” they added, “the modern opinion has been, that the power of amotion is *incident* to the corporation, though Bagg’s case seems contrary” (c).

THIS modern opinion has been considered as completely established ever since the case of the King and Richardson, in the 31 G. 2 (d). An information in the nature of *quo warranto* having been filed against the defendant to shew by what authority he claimed to be one of the portmen of the town of Ipswich, he set out in his plea certain letters patent of incorporation, which among other things granted, “that all elections of the portmen, and of every of them,

(a) Tidderley’s case, 1 Sid. 14.

(b) 1 Bur. 529. (c) 2 Str. 819, 820.

(d) Rex v. Richardson. 1 Bur. 517.

on the death or *removal* of any of them, 'or otherwise, in whatsoever manner happening, should be made by the others, or residue of the portmen for the time being, or the greater part of them :'' he then set out a removal of nine portmen by an assembly of the corporation at large, under the name of a great court, and an election of himself by the only remaining portman of the borough ; but he did not state any power in the corporation to remove, either by charter or prescription. 'The council for the prosecution, relying on the authority of Bagg's case, and others founded upon it, denied that a corporation had a power inherently or incidentally to remove, and contended that, as, in the present case, it was neither given by charter nor claimed by prescription, the removal of the nine portmen was without authority ; and they treated the observation of the court, in the case of Lord Bruce, as deserving little credit, because the modern opinion there hinted at, no where appeared.

THE counsel for the defendant urged, that this power of removal was *implied* and *inherent* and *incidental* to the constitution of every corporation ; for that the law gave whatever was necessary to the enjoyment of a grant ; on which principle they contended, that all corporations must have inherent in them a power to exercise acts essential to their existence and preservation ; that the power of amotion was one of these ; and that this question was not affected by magna charta ; because a man might, by that, be removed from his freehold, if he could be so *by the law of the land* ; and if the power of amotion was incident to a corporation, an amotion was *by the law of the land*, which took place in consequence of that power.

LORD Mansfield, in delivering the opinion of the court, stated the second resolution in Bagg's case in the words of it as given above ; and, after distributing into different
 classes

classes the offences for which a corporator or officer of a corporation might be removed, observed, that the distinction taken by Lord Coke seemed to relate to the power of *trial*, and not to the power of *amotion*, and that he seemed to lay down “that where the corporation *has* power by charter or prescription, they may try as well as remove; but that where they have *no* such power, there must be a *previous conviction* on an indictment.” So that ‘*after an indictment and conviction at common law,*’ continued his lordship, ‘*this authority admits, that the power of amotion is incident to every corporation.*——The law of corporations was not so well understood and settled at the time of Bagg’s case as it has been since; and “whether a power of amotion was incident to the corporation” could be no part of the question in judgment in that case, nor necessary to the determination of it. The power of amotion was there exercised by the *select body*; and the *cause was insufficient*——We, therefore, think the court was well warranted in Lord Bruce’s case, to *controvert* the authority of the proposition *collected* from what is said in Bagg’s case, “That there can be *no* power of amotion, *unless* given by charter or claimed by prescription:” and we think, that from the reason of the thing, from the nature of corporations, and for the sake of order and government, this power is incident.—Lord Coke himself says (*a*), “there is a tacit condition annexed to the franchise, which if he break he may be disfranchised.” But where the offence is merely against his duty as a corporator, he can be tried for it only by the corporation. Unless the power, therefore, be incident, franchises or offices might be forfeited for offences; and yet there would be *no means* to carry the law into execution.’

(a) 11 Co. 98, a.

THIS power, like every other *incidental* power, is incident to the corporation at large, and not to any select body, and as applied to the latter, the proposition is true "that there can be *no* power of amotion, unless given by charter or claimed by prescription, or in consequence of a bye law made by the body at large." But as all the powers of corporations are the subjects of positive institution, a select body *may* possess the power of amotion, and frequently does, under one or other of these authorities (*a*).—And it is laid down as a general principle, that where by custom a particular body has acquired that power, and a subsequent charter in some respects new modelling the constitution of the corporation, but retaining the particular body, without restraining its customary power of disfranchisement, that power still continues in the particular body.—In the city of Carlisle, there were before the 21st of July, 13 Car. 1, twelve aldermen "consisting of the most sufficient citizens, of whom one was annually chosen mayor, and a custom had prevailed, that this body, or the greater part of them, of whom the mayor was always to be one, might remove any alderman from his place and office of alderman for just and reasonable cause:" at the time above-mentioned the corporation obtained a charter from Charles the first, which, in some degree, new modelled its constitution, but retained this body of aldermen, without taking any notice of their power of amotion; on their afterwards claiming to exercise it, the court of King's Bench (*b*) thought it still continued, notwithstanding the charter; that the latter did not extinguish any of their ancient privileges; but the corporation might use them in the same manner as before (*c*).

(*a*) Vid. the case of Lyme Regis, Doug. 149, (154.)

(*b*) 33 Car. 2.

(*c*) Raym. 435, 439.

THIS power, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at a regular meeting held in a corporate character, or at least held in the character, by virtue of which they are empowered to amove: thus, where it appeared by the return to a mandamus that the common council had the power of amotion; and it was alleged as a fact, that the party complaining was removed by thirty of the common councilmen, in the council chamber assembled, the court held this to be insufficient; because it did not appear "that the thirty common councilmen were *then and there* assembled as a common council, as they might be there to feast, or for other purposes not connected with their corporate character" (a).

A MANDAMUS having been directed to the mayor, bailiffs, and burgeses of the town of Northampton, commanding them to restore one Braithwaite to the place of common councilman; they returned, that by letters patent of incorporation, power was given them of holding a common council, consisting of a mayor, two bailiffs, and forty-eight burgeses; that the power of removing any common councilman from his place upon just cause, was given to the mayor, bailiffs, and *such* burgeses as had been mayors; that Braithwaite had been a common councilman, and committed several offences, which were particularly expressed; and that the *common council* assembled together and procured Braithwaite to be summoned, but that he did not appear to answer; on which he was removed from his office and place in the common council, "*by the mayor and burgeses, by the authority, and according to the charter aforesaid.*"

(a) Rex v. Taylor, 3 Salk. 231.

IT was objected, that this amotion was not according to the authority given by the charter ; for, that it was said to be by the mayor and burgesſes, ſo that it might have been by the mayor and *all* the burgesſes, many of whom might not have been mayors, whereas the charter confined the power to the mayor and *ſuch* of the burgesſes as *had* been mayors : but the objection was over-ruled, on the ground, that it muſt be intended that *all* the burgesſes were preſent, and agreed to the amotion ; and that as it was alleged to be by the mayor and burgesſes *according* to the charter, the diſſent of the burgesſes who were qualified, was not to be preſumed (*a*).

THIS power of amotion, when poſſeſſed as incident to the corporation at large, cannot be exerciſed without reaſonable cauſe ; nor can it be ſo exerciſed either by the corporation at large, or by a ſelect body, whether given by charter or claimed by preſcription, if it be given or claimed only in general terms (*b*) : but if a charter, by expreſs words, empower either the corporation at large, or a ſelect body, to remove an officer at pleaſure, or empower them to chooſe him *during* pleaſure, they may in either caſe remove him without cauſe (*c*). So, a corporation by preſcription may, by cuſtom, have the power of removing an officer at pleaſure : but, in the return to a mandamus, commanding them to reſtore an officer ſo removed, it will not be ſufficient to ſtate “ that they are a corporation by preſcription, and that the King, by letters patent, reciting that they had a cuſtom to remove at pleaſure, confirmed *that* with other cuſtoms ; ” they muſt allege the cuſtom in

(*a*) Braithwaite's caſe, 1 Ventr. 19, 20.

(*b*) Dyer 332, pl. 28, in marg. T. 4 Jac. B. R.

(*c*) Sir T. Jones, 52. 3 Keb. 667, Raym. 188. 1 Ventr. 77, 82.

positive terms, and not simply by way of recital in the letters patent (*a*).

So, if an officer, either by the provision of a charter, or by custom, be eligible in the alternative for life, or during pleasure, and he be chosen to continue during pleasure, he may, at any time, be removed without cause (*b*): and where an officer is removeable at pleasure, or chosen to continue *during* pleasure, the election of another is a determination of his office, without any formal removal (*c*), or notice of the intention to remove him (*d*). So, if the mayor for the time being have power to elect a town clerk, it follows of course, that he may remove the former town clerk at his pleasure (*e*).

BUT where an officer is removeable at pleasure, the corporation, in their return to a mandamus, commanding them to restore him, ought to rely solely on that circumstance; for they cannot take advantage of it, if they return a cause and that cause be not sufficient; because it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will (*f*).

THERE are some offices in corporations, which, when there is no custom or express provision of a charter to the contrary, are generally understood to be held for the life of the possessor, unless he be removed for reasonable cause: such are the offices of alderman, jurat, or capital burghes, who, in their official capacity, are constituent members of the corporation; and of recorder, town clerk, and others, who are generally not members of the corporation, but merely ministerial officers or servants.—A clause in a

(*a*) *Rex v. mayor, &c. of Coventry.* 1 *Ld. Raym.* 391, 2.

(*b*) 2 *Show.* 69, 70. 1 *Ventr.* 342, *Pepis's case.*

(*c*) 1 *Str.* 674, *Rex v. mayor of Canterbury.*

(*d*) 2 *Keb.* 641. (*e*) 1 *Sid.* 15. (*f*) 2 *Ld. Raym.* 1240.

charter giving an arbitrary power of removal, is good as applied to the latter (*a*), but, according to the opinion expressed in some books, is void as applied to the former (*b*). The same observation applies to a claim of this power by custom.—Yet if the corporation possess a power by charter or by custom to elect an alderman or other officer of an equivalent denomination, to continue *during* pleasure, and they so elect him, they may *remove* him at pleasure; because, by the express constitution of the corporation, the presumption of his holding the office for life is excluded.

A COMMON freeman cannot be deprived of his freedom at the *pleasure* of the corporation at large, or of any select body, whether that power be claimed by charter or prescription (*c*).

THE case of a common councilman is, in several books, distinguished, in this respect, from that of an alderman; it being frequently held that a power of removal is good as to the former, and void as to the latter.

ONE Warren having obtained a writ of restitution, commanding the corporation of Coventry to restore him to the place of common councilman, from which he complained of having been removed, “The corporation returned, that they had a custom to elect any one to be of the council, and to remove him at pleasure, and that Warren was removed, &c. the court held the return was good; and took this difference, that where a man was a freeman or alderman, they could not remove him from his freedom or place without cause, and that in such case, such a custom was

(*a*) Vid. all the authorities before cited.

(*b*) 1 Keb. 812, 813, Warren’s case, 2 Cro. 540, cited Raym. 188.
1 Ventr. 77, 82.

(*c*) Vid. Warren’s case before cited.

void,

void, because the party had a freehold in his freedom or place; but to be *of council* was a thing *collateral* to a corporation."—Warren's council then suggested, that he was an alderman, and had been removed, on which a new writ was issued to restore him to his aldermanship (*a*).

THIS case of Warren is cited in several subsequent cases, and the authority of it recognized (*b*).

IN a much later case, which arose in the same corporation of Coventry, it was stated in the return to a mandamus, that the defendants were a corporation by prescription, and that King James, by letters patent, *reciting*, that they had a custom to elect any one to be of the common council, and to remove him at pleasure, confirmed *that* among other customs; it then concluded, that by force of the *said* custom for time immemorial used, and according to the form of the aforesaid letters patent, they removed the plaintiff.—This exception was taken to this return, that by the election, the plaintiff had an estate for life, and that a custom to remove an officer for life, without cause, was void.—Holt C. J. over-ruled the exception, on the ground that it was not *returned* that he was an officer for life, but on the contrary, that he might be removed at pleasure; and that if the constitution of a corporation were to elect officers removeable at pleasure, they must pursue their custom, and could not elect for a longer or more durable interest; but his estate was always liable to the determination annexed to it by the custom (*c*). A peremptory mandamus, however, was granted on another objection; that the custom was not positively alleged, but only by way of recital in the letters patent (*d*).

(*a*) 2 Cro. 540, says vid. 26 H. 8, 5, vid. 2 Rol. Rep. 112.

(*b*) Vid. Raym. 188. 1 Ventr. 77, 82.

(*c*) Rex v. mayor, &c. of Coventry. 1 Ld. Raym. 391.

(*d*) Vid. ante, p. 59.

IN a subsequent case (*a*), the defendants, to a mandamus commanding them to restore one J. S. to the office of common councilman, returned, that, by their charter, they might remove the common councilmen at their discretion whenever and as often as they pleased, and that by their discretion they removed J. S. It was urged, that they ought to have shewn some reason, but the court, *on consideration*, held, that as their charter gave them a power of removal at discretion, that was unnecessary.

To the power of amotion, or disfranchisement, the power of holding a corporate meeting for that purpose is necessarily incident, whether the former be in a select body or in the corporation at large; and therefore it is not necessary that the latter should be expressly given by charter or claimed by custom (*b*).

THE cause for which a member of a corporation is disfranchised, or an officer removed, must be something which has arisen subsequently to the admission of the one to the enjoyment of his franchise, or of the other to the exercise of his office: the power of disfranchisement or amotion cannot be exercised for a defect of original qualification (*c*); that can only be questioned by a prosecution by information in the nature of *quo warranto*.

THE offences for which a corporator may be disfranchised, or a corporate officer removed, have been distributed into three distinct classes (*d*).

FIRST, Such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office.

(*a*) *Rex v. Burgum Andover*. 1 *Ld. Raym.* 710.

(*b*) *Vid. Rex v. mayor, &c. of Lyme Regis*, *Doug.* 153, (148), 155, (150), 158, (153).

(*c*) *Rex v. mayor, &c. of Lyme Regis*, *Doug.* 80, 81, 85.

(*d*) *B. R. H.* 154, 155. 1 *Bur.* 538.

SECONDLY,

SECONDLY, Such as have no immediate relation to his corporate or official character, but are in themselves of so *infamous* a nature, as to render the offender unfit to enjoy *any* public-franchise; such as perjury, forgery, &c.

AND, Thirdly, offences of a *mixed* nature, being not only against his corporate or official duty, but also indictable at common law.

WITH respect to the first sort of offences, Lord Coke, in James Bagg's case (*a*), expresses himself thus: "The cause of disfranchisement ought to be grounded on an act which is against the duty of a citizen or burghers, and to the prejudice of the public good of the city or borough of which he is a citizen or burghers, and against the oath which he took when he was sworn a freeman of the city or borough; for although one shall not be charged in a *judicial* court (*b*), for the breach of a general oath, which he took when he became officer, minister, citizen, or burghers, yet if the act which he doth be against the duty and trust of his freedom, and to the prejudice of the city or borough, and also against his oath, it enforces much the cause of his removal, and there is a condition in law tacitly annexed to his freedom or liberty, which if he break, he may be disfranchised."

THIS description, in the terms of it, relates only to a common freeman; but the doctrine is equally applicable to an officer, whether merely *ministerial* or a *member* of the corporation.

To burn or deface the charters or evidences of the corporation; or to raise or corrupt the books, are offences against the corporate duty of a corporator, for which he

(*a*) First resolution. 11 Co. 98, a. 1 Keb. 597.

(*b*) *i. e.* indicted for perjury.

may be removed (*a*); but in the case of a rasure of the books, the party must appear to have acted maliciously, and to the detriment of the corporation, for it might happen that the entry, as it stood, was wrong, and that he only made it as it ought to be (*b*).

So, if he make a riot in disturbance of an election of a mayor or other officer (*c*), or endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the business of the corporation (*d*); so, if he continue in court and make orders, after the court is adjourned: thus, where the bailiffs of the corporation of the town of Kingston upon Thames held a court for the purpose of appointing an attorney of the court, and on the appearance of riot and disorder adjourned the court, and commanded all persons to depart, and they, with their party, left the town hall; and some of the opposite party continued in the hall, insisted that the court was not dissolved, affirmed that they themselves were a court, made several orders, as acts of court, and caused them to be entered in the court book, in which the orders of the court were usually entered: It was held, that this was sufficient cause of disfranchisement, because it was more than a mere opposition; they had proceeded to action, and set up one government against another, which tended to subvert all regular and peaceable government within the town (*e*).

CIRCUMSTANCES which have no immediate relation to the corporation, may be a sufficient cause to remove a man from an office of magistracy, provided they be such as render him incapable or unfit to execute the office; such as

(*a*) James Bagg's case, 11 Co. 99, a. (*b*) 1 Ld. Raym. 226.

(*c*) Raym. 438. (*d*) B. R. H. 156.

(*e*) Style, 477, 8, 9, 480, 1.

habitual drunkenness in an alderman, though if a man were drunk by accident, that would not be sufficient cause to remove him (*a*).

So, it has been held to be a sufficient cause to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though such a cause would certainly not be sufficient to deprive a man of his freedom (*b*).

BANKRUPTCY, and not having obtained his certificate, is not alone sufficient cause for removing a man from the office of common councilman, though some *one* or *more* of the *consequences* of bankruptcy may eventually become so: bankruptcy itself is not an offence against the duty of his office; neither is it an *offence* against the law of the land, whatever the old statutes may intimate to this purpose: a man may be a bankrupt without any fault of his own; he may be able to pay twenty shillings in the pound, notwithstanding his bankruptcy; or he may very soon obtain his certificate after the commission has issued; and no particular *census* is requisite as a qualification to be a corporator; a power to disfranchise a man for having become bankrupt, might be turned to very bad purposes, by juntoes in corporations, or under particular circumstances, and with particular views: a run upon a man of great fortune and credit might be artfully managed, so as to reduce him to bankruptcy; and the cause of a common councilman, in this respect, is the same as that of a common freeman (*c*).

OLD age is not a sufficient cause to deprive an alderman of his office (*d*).

NON-ATTENDANCE at the courts of the corporation is not sufficient cause of removal, when the presence of the

(*a*) *Rex v. Taylor*, 3 Salk. 231.

(*b*) 3 Salk. 229.

(*c*) *Case of Clegg*. 2 Bur. 732, vid. 1 vol. 448.

(*d*) 2 Rol. Rep. 11. 2 Rol. Abr. 456.

party is not *necessary*, and no particular business is obstructed by his absence, though his absence be wilful, and notwithstanding he may have due notice to attend: though the usual signal for holding a court may be given, a member may not know of it; though he know of it, he may be innocently absent, where he thinks his presence not at all necessary, and where he does not imagine that any business of consequence is to be proposed: there is not an officer or freeman in the kingdom, who is a member of an assembly, who might not be removed or disfranchised, if such a cause were sufficient. At times, every alderman, every common councilman, not necessary to the constitution of the assembly, knowingly omits attending: this doctrine applies equally to the case of non-attendance at courts held occasionally, and courts held on regular stated days (*a*).

IN a plea to an information, in the nature of quo warranto, the defendant alleged a custom, "that the bailiffs, burghesses, and commonalty, for the time being, *or so many of them as would be present*, had met, and of right ought to meet together in the Moot-hall yearly and every year, at divers times in the year; on the 8th of September in every year, for the election of bailiffs, and for transacting the other business of the borough, and again at Michaelmas in every year, for the latter purpose, and at such *other* time and times of the year as to the bailiffs seemed meet, on due notice given, for the better ordering, regulation, and government of the borough; that these assemblies were called the Great Courts of the borough, and that the bailiffs, for the time being, presided at them.—That there were twelve burghesses called Portmen; and that every portman, during the time of his being in that office, ought,

(*a*) *Rex v. Richardson*. 1 Bur. 540, 541.

according

according to the custom of the borough, to be resident within the town or liberties of it, and, by the *duty* of his office, ought to attend and be present at every great court, to advise and assist the bailiffs, for the time being, in the good rule and government of the borough.—That for the space of a year and upwards, before the 8th of September, 1755, ten persons, whose names were mentioned, had been portmen of the borough; that within the space of that year, four occasional great courts were held on the days particularly specified in the plea, and that before the holding of each, *due notice* had been given of the intention to hold it. That on the 8th of September, a great number of the burgesses and commonalty assembled in the Moothall, and there held a great court for the election of bailiffs, of which due notice had been previously given.—That nine of the portmen, whose names were mentioned, did not, nor did any of them appear at the same great court, but wilfully absented themselves; and that they, and every and each of them, had wilfully absented themselves from the other great courts, and from every of them during the year last past, and had voluntarily neglected to attend at them, or at any of them, by which each of them *neglected* and omitted the duty and execution of his office, and thereby deprived the then bailiffs, burgesses, and commonalty of the borough assembled at the said several great courts, of that council, aid, assistance, and advice which, by the duty of his office of portman, and according to the obligation of the oath of office by him taken in that behalf, he ought to have given.”

SUCH were the offences charged against these nine portmen, which the plea alleged to be “to the great hindrance and delay of the public business of the borough; to the great damage, disappointment, and prejudice of the bailiffs, burgesses, and commonalty of the borough, and to the

great hindrance, and in open subversion of the good rule, government, and constitution of the same."

THE plea then stated the proceedings adopted previously to the removal of these nine portmen, and their consequent removal for these offences.

LORD Mansfield observed, "that it was not stated that the removed portmen had *personal* notice of the holding of these great courts; the notice, therefore, must have been by some customary signal, as the sounding of a horn, or the tolling of a bell, of which the removed portmen might, in fact, have no knowledge; that it was not alleged that the portmen's presence was *necessary* to the holding of the great court, but that on the contrary, the prescription was alleged to be, that the bailiffs, burgeses, and commonalty, or *so* many of them as *would* be present, had assembled in the Moothall: and that it was not alleged particularly, that any *particular* business was obstructed or defeated by the portmen's absence; the plea alleged, indeed, that they *wilfully* absented; but that was a consequence of law; for in pleading, *facts* must be alleged, from which the court might judge whether the absence was wilful; on which facts issues might be taken and tried by the jury." Having applied the principles before stated to this case, he concluded by saying, that it was not necessary, and would be highly improper, at that time, to say what kind of absence, or under what circumstances, non-attendance might be a cause of forfeiture; it was sufficient that the absence, with all the circumstances alleged by this plea, was *not* a cause; and the court were unanimously of opinion that it was not (a).

A MANDAMUS having been awarded against the mayor and burgeses of Lyme Regis, commanding them to restore Arthur Raymond to the office of a capital burges,

(a) Rex v. Richardson, Portman of Ipswich. 1 Bur. 517.

they

they returned, among other things, that the mayor and burgesſes had been immemorially accuſtomed to have a guild-houſe, called the Moothall; that from time immemorial, till the granting of the letters patent therein after mentioned, and alſo ever ſince, there had been, and ſtill was, a council of the mayor and burgesſes, conſiſting of the mayor and certain other perſons, who, immemorially, until the granting of the letters patent, were called *counſellors*, and from the time of the granting of the letters patent, *capital burgesſes*, and that immemorially, till the letters patent, the council conſiſted of *eleven* burgesſes, inhabiting and reſiding within the borough or the liberties thereof, of whom the mayor was one.—That Queen Elizabeth, in the 33d year of her reign, by letters patent, granted, among other things, that there ſhould be for ever in the borough, a mayor and *eleven* other burgesſes in number only, out of the burgesſes of the borough to be choſen and conſtituted according to the form in the letters patent thereunder ſpecified, who ſhould be called capital burgesſes, and continue for life, unleſs, in the mean time, for their own bad government they ſhould be removed; that the ſaid mayor and eleven burgesſes thereby appointed by name, or the greater part of them, the mayor for the time being one, whenever to them, or the greater part of them, it ſhould ſeem fit in their ſound prudence and diſcretions, ſhould chooſe, not exceeding the number of *four*, other perſons of the inhabitants of the borough to be other capital burgesſes, ſo that the other capital burgesſes ſo to be choſen, together with the mayor and the other eleven capital burgesſes, ſhould not exceed the number of *ſixteen*; that as often as the capital burgesſes, *ſo to be nominated*, or thereafter to be choſen, that is, the eleven and four, or any of them, ſhould die or be removed, then it ſhould be lawful *to the other*

capital burgesſes, being the common council, or the greater part of them, to chooſe one or more of the other burgesſes, in the place or places of ſuch capital burgesſes or burgesſes ſo happening to die, or to be removed; and that he or they ſo choſen, ſhould be a capital burgesſes or capital burgesſes, in like manner as the capital burgesſes by the letters patent before conſtituted were or ſhould be: that whenever a vacancy or vacancies ſhould happen by the death or removal of any of the ſaid capital burgesſes, another or others of the burgesſes ſhould be elected a capital burgesſes or capital burgesſes by the reſt of the council, or the greater part of them, in the place of ſuch capital burgesſes ſo happening to die or to be removed.—That by the ſaid letters patent, the Queen granted to the mayor and capital burgesſes, and their ſucceſſors, that it ſhould be lawful for them to keep or appoint a guild, or council-houſe within the borough, commonly called the Moothall, and that the ſaid mayor and capital burgesſes, the common council of the borough or town aforeſaid, or the greater part of them for the time being, as often as to them it ſhould ſeem neceſſary, ſhould and might convoke, and hold in the ſaid houſe, a certain convocation of the ſame mayor and capital burgesſes, or the greater part of them, and in the ſame convocation ſhould and might treat, &c. of the ſtatutes, acts, articles, and ordinances touching the borough or town, and the good rule, ſtate, and government thereof, according to the tenor of the ſaid letters patent.—That the proſecutor was elected a capital burgesſes on the 27th of Auguſt, 1759, and ſworn into the office on the ſame day; that on the 10th of Auguſt, 1778, the mayor duly appointed a meeting or convocation of the mayor and capital burgesſes, to be holden at the council-chamber within the Moothall or guildhall, on the 15th of Auguſt, at eleven o'clock in the forenoon, to elect
one

one of the burgesſes into the office of a capital burgeſs, in the room of Henry Fane, deceased ; that before the 15th of Auguſt, he cauſed due notice to be given to all the capital burgesſes, within the reach of ſummons, of his having appointed ſuch meeting, and cauſed ſuch due notice to be given, on the 11th of Auguſt, to the proſecutor in perſon, by which he ſummoned him to attend at the council-chamber within the Moothall, at the ſaid meeting ; that on the 15th of Auguſt, the mayor and two of the capital burgesſes met at the council-chamber, for the purpoſe of holding a meeting of the mayor and capital burgesſes, according to the notice, for the election of a capital burgeſs in the room of the ſaid Henry Fane, deceased ; but that they not being a ſufficient number for that purpoſe, and becauſe a ſufficient number did not then and there appear to hold ſuch meeting, none could be, or was then held, and that the proſecutor did not attend or appear at the hour of eleven, nor at any time on that day, according to the appointment and notice, but contriving and deſigning *wilfully* to prevent the mayor and capital burgesſes from holding ſuch meeting for the purpoſe aforeſaid, did *wilfully* abſent himſelf from the council-chamber during the whole day, and did, on the ſaid day mentioned, combine with the Honourable Henry Fane, and fix others, by name, being or claiming to be capital burgesſes, and having alſo before received notice of the ſaid meeting (a), to prevent ſuch meeting from being held, and that in proſecution of ſuch combination, they wilfully abſented themſelves from the council-chamber during the whole of the ſaid 15th of Auguſt ; and that by reaſon of the abſence of the proſecutor and of a number of other capital burgesſes ſufficient to proceed to the election, no meeting for the ſaid purpoſe could be or was held on the 15th of Auguſt, according to the appointment and notice.

(a) There was no allegation that they had been ſummoned.

The return then stated, that the mayor, on the said 15th of August, duly appointed another meeting to be held at the council-chamber on the 21st of August, for the same purpose, and repeated the same allegations, with regard to this meeting, as had been made with respect to the former, except the charge of combination: and then stated, that the prosecutor, by his so wilfully absenting himself from the said several meetings so appointed for the 15th and 21st of August, and by his said combination, did *wilfully* neglect and violate the duty and execution of his office.—It then stated the proceedings adopted for the removal, and the consequent removal of the prosecutor for these offences,

LORD Mansfield said he had doubted for some time on the question, whether, in the present case, it was sufficiently shewn in the return, that Raymond was of the common council, in whom it was alleged the right of election was vested, and of which he must necessarily be, before he could be guilty of the offence for which he was stated to have been amoved: there were three parts of the charter which tended to shew, that the council consisted of *all* the capital burgeses, and that the expressions, “common council,” and “capital burgeses,” were synonymous. First, “Capital burgeses, being the common council,” and not “being *of* the common council.” Secondly, If a capital burges die, or is removed, a new one is to be chosen “by the rest of the council, or the greater part of them.” Thirdly, The passage mentioned relative to the meeting or convocation. But still all those passages and expressions were ambiguous; they afforded a strong inference in point of language: but were they sufficient in this charter to constitute a common council composed of *all* the capital burgeses? He thought not, because the charter referred to a previous known constitution: the
council

council might have been created by prescription, or a former charter to which this charter referred; and if this was the case, the constitution of the council, by such prescription or previous charter, should have been set forth (a).

NON-RESIDENCE within a borough cannot be a sufficient cause to disfranchise a freeman; because he has his freedom for his own benefit, and his residence is of little consequence to the corporation at large.

BUT a *total* desertion of the borough, by an alderman with his family, is a good cause to remove him from the office, because he is thereby rendered incapable of doing his duty to the corporation (b), but it is not a cause to disfranchise him, because, though he cease to be an alderman, he may still continue a freeman. Nor is it every temporary absence, that will be good cause for removing an alderman; he may have some reasonable cause of absence, as sickness, or going to the Bath for the recovery of his health, or being employed in the service of the King: he may leave a servant in the house, which is a proof of his intention to return, and makes him virtually an inhabitant; and if he return before his actual amotion, that may cure the defect of his absence, however long continued. It has been held, that it was not a good cause to remove an alderman, that he had left the borough for four months *with his whole family* (c); and, in general, wherever non-residence

(a) Rex v. mayor and burgessees of Lyme Regis, on the prosecution of Arthur Raymond, Doug. 177, (169).

(b) City of Exeter v. Glide, 4 Mod. 36. 1 Sh. 258, 364, case of Fetherstonhaugh in Rex v. mayor of Newcastle upon Tyne, cited 1 Bur. 530, Doug. 157, (152). Rex v. Truebody. 2 Ld. Raym. 1275. Rex v. Lyme Regis, Doug. 149, (144).

(c) Rex v. mayor of Leicester, 4 Bur. 2087.

is assigned as a cause for the removal of an alderman, or officer of similar denomination, it must appear that residence is required by the constitution of the corporation, or that the business of the corporation has been obstructed by the non-residence of the party removed.

A MANDAMUS having been awarded against the mayor and burgesses of Lyme Regis, commanding them to restore Francis Fane to the office of capital burgess, they returned to the same effect as in the case of Arthur Raymond, so far as related to the original constitution of the borough by prescription, and by the charter of Queen Elizabeth; and besides, "That till the letters patent, every *counsellor*, and since, every *capital burgess*, was accustomed to reside and inhabit, and of right ought to reside and inhabit within the borough, or the liberties thereof, to advise and assist the mayor, touching the state, good rule, and government of the borough, and the administration of justice within the same; *that ever since the letters patent, the council had consisted, and of right ought to consist, of the mayor and the capital burgesses of the borough for the time being*; that Fane, on the 29th of August, 1774, was elected a capital burgess, and afterwards, on the same day, took the oath usually taken by a capital burgess on his admission: that he had not, at any time since his election, inhabited or resided within the borough, or the liberties thereof, but on the contrary had ever since inhabited and resided, with his family, in places out of, and at a great distance from the said borough, and the liberties thereof, and had during all that time *voluntarily, without good occasion*, absented himself from the borough, and from the duty of the office of a capital burgess; and that by his non-residence, and his voluntary absence from the borough, and the duty of his office, he did, during all the time of his being a capital burgess, wilfully

wilfully neglect and omit the duty and execution of his office, and deprive the mayor and burgesſes of that council and aſſiſtance and advice, which by the duty of his office, and according to his oath, he ought to have given.”——

The return then ſtated the proceedings relative to his removal.

AT firſt the court pronounced judgment in favour of the return; but it being afterwards ſuggeſted, that the objection taken in the caſe of Raymont applied likewise to this, the matter was poſtponed till the opinion of the court ſhould be taken on that objection (*a*); and, immediately after that opinion was given, a motion was made to quaſh the return in the preſent caſe. It was ſtated, on the part of the proſecution, that by the returns in thoſe caſes when the diſfranchiſement had been for non-reſidence, the *preſcriptive* neceſſity of reſidence applied only to the *council*, and as it was not directly averred that the proſecutor was of the council, the non-reſidence might be no offence in him.— Lord Mansfield ſaid, the objection was irrefragable, and that the averment, “that, ſince the charter, the council had conſiſted of the mayor and capital burgesſes,” was not ſufficient, as it did not appear that all the ſixteen came to be of the council, which, before the charter, was ſtated to conſiſt only of eleven (*b*).

WHEREVER non-reſidence is a cauſe of amotion, it does not render the office *ipſo facto* void, but only voidable; and there muſt be an actual amotion before any proceedings can be had againſt the party for an uſurpation (*c*).

(*a*) Rex v. mayor and burgesſes of Lyme Regis, on the proſecution of Francis Fane, Doug. 149, (144).

(*b*) Doug. 182, (174) in the notes.

(*c*) Vaughan v. Lewis, Carth. 227. Rex v. Ponſonby, Sayer 245. 5 Brown, P. C. 287. Rex v. Heaven, 2 Term. Rep. 772.

IT

It is no cause of removal, that a corporator has used opprobrious or indecent language to the mayor, or other principal magistrates of the corporation, as if he call the mayor a knave, or say, that he has done that in the execution of his office, which he cannot answer (*a*); though the words be in consequence of an admonition from the mayor, for a malicious act to another burges; as where a burges being church-warden presented one of the burgeses maliciously, without cause, for being absent from the perambulation; for which being rebuked by the mayor, he said contemptuously, *I care not for Mr. Mayor, nor for any of the burgeses* (*b*): nor does it seem a good cause of amotion that a man has written a libel on the mayor, or on another member of the corporation (*c*); it may, in some of these cases, be proper to commit the offender till he find sureties for his good behaviour; or some of the offences may be a foundation for an action at the suit of the party injured; but they can be no cause of disfranchisement; so, neither can it be a good cause of disfranchisement or amotion, that the conduct of the party is troublesome or displeasing to the body at large (*d*).

So, a *custom* to disfranchise for contemptuous words is void (*e*), even in the city of London, whose customs are confirmed by act of parliament, for that confirmation cannot extend to unreasonable customs, which this clearly is (*f*).

(*a*) James Bagg's case, 11 Co. 96, 97, 98, 99.

(*b*) Clerk's case, 2 Cro. 506.

(*c*) Pr. Holt C. J. Fortes, 275, 276.

(*d*) Vid. Bagg's case, 11 Co. 96, &c.

(*e*) 2 Salk. 426. 2 Ld. Raym. 777.

(*f*) Clark's case, 1 Ventr. 327. Vid. 1 Ventr. 302, a dictum of Twisden to the contrary.

IN the case of Sir Thomas Earle, alderman of Bristol, the following circumstances have been adjudged to be no good cause of removal.

FIRST, "That disregarding his oath taken on his admission into the common council, and designing to draw Sir Richard Hart, then mayor, and other good citizens, into the displeasure of the King and Queen (*a*), he composed and wrote a certain letter to the Earl of Shrewsbury, then secretary of state, in which, among other falsehoods and calumnies charged on the said mayor, the said Thomas Earle charged him with suborning a wicked fellow to swear any thing which he should be instructed, and suggesting, that thereby the said secretary of state would have great trouble while Hart continued mayor, and that those citizens, who were of the mayor's party, were zealous Jacobites, and that the said mayor intended to baffle the next election for members of parliament; when, in truth, the said Sir Richard Hart was a true and faithful subject of the King and Queen, and never guilty of any subornation."

SECONDLY, "That the said Thomas Earle, on such a day, when the mayor and aldermen were in the Tholsey court, in discharge of their office, *riotously*, and with strong hand, with a great number of men, entered, and insolently threatened the said mayor and aldermen for bailing one Francis Moore, who was committed for seditious words; and that the clamour and riot were so great, that the mayor and aldermen then present were in fear of their lives, and thereby forced to remand the said Francis Moore to the gaol after they had bailed him, when, in truth, the said Francis was bailable by law."

THIRDLY, "That the said Thomas Earle, and others of the common council, on such a day, in their military ca-

(*a*) This was in the reign of William and Mary.

capacity, as deputy lieutenants, required the common council book to be carried before the Earl of Macclesfield, lord lieutenant of the said city, *with an intention* to make an accusation against the said Hart, then mayor, to betray the secrets of the city, to reflect on the government of it, and draw in question the proceedings of the mayor and council, before a person who had no conusance of the matter, *against the duties of his office, and against his oath.*"

To the first of these causes it was objected, that the matter contained in it was no ground for a disfranchisement, or, if it ~~was~~, that it was not sufficiently alleged; for it was only said, that Earle wrote such a letter, but not that it was ever sent abroad or published; and that the writing alone, without publication, was no scandal.—It might have been added, that if the letter had been really published, the proper remedy was to prosecute for a libel.

THE second cause, it was said, was altogether uncertain; for it was only alleged in general terms that he threatened the mayor and aldermen, and it did not appear by the return, that there were any aldermen in Bristol, or that he used any particular act of violence; and that the consequence was trivial, namely, that a seditious fellow,ailable as was pretended, was remanded to gaol.

THE third cause was still more frivolous; for nothing more was pretended, than that a request was made by Earle that the common council book might be carried before the Lord Lieutenant, *with an intention, &c.* which request was never granted; and that all the matter which followed the words, "with an intention," amounted to nothing more than an inuendo, which was nothing to the purpose (a).

(a) Carth. 173—176.

THE power of conferring degrees, and of degrading, in the universities, is in the vice-chancellor, masters, and scholars, assembled in a body; but they cannot degrade without reasonable cause: and it was decided in the case of Dr. Bentley (*a*), that a contempt to the vice-chancellor, as a judge, was not a sufficient cause to degrade.

THE Doctor was head of a college in Cambridge, and was summoned to the vice-chancellor's court to answer Dr. Middleton, in a plaint levied against him there; the doctor took the summons from the beadle, and contemptuously said, "the vice-chancellor acted foolishly; that he was not his judge; that he would not obey him; and that the process was illegal."—The vice-chancellor *suspended* him as for a contempt, and afterwards, on a grace proposed to a congregation of doctors and heads of houses by the vice-chancellor, the doctor was degraded: on his application to the court of King's Bench, for a mandamus to be restored, the court said, that though the conduct of Doctor Bentley was highly blameable, and that, if he had so treated the process of that court, they would have punished him severely; yet, that the vice chancellor had gone beyond his authority in *suspending* him, and that the congregation, though they had authority to suspend or degrade for any reasonable cause, and though, *perhaps*, a contempt to *them* might have been considered as a reasonable cause; yet a contempt to the vice-chancellor's court was not a contempt to the university, and the congregation had exceeded their authority.

IF a man threaten, or endeavour either by himself or in combination with others, to do a thing against the trust of his freedom, and to the prejudice of the public good of the city or borough, but do not put it in execution; as if he

(*a*) 8 Mod. 148. Fortesc. 202. 2 Ld. Raym. 1334.—Str. 557.
threaten

threaten the ruin of their charter or privileges, or dissuade the payment of customs due; this may be a good cause to punish him as before mentioned, but not to disfranchise him; "because," says Lord Coke, "a freeman of a city or borough, has a freehold in his freedom for life, and, with others in their politic capacity, has an inheritance in the lands of the corporation, and an interest in their goods; and probably his trade or means of living with his credit and estimation may be concerned; and it would be against the public interest if for a mere menace or endeavour of which he might repent, before the execution, and from which no prejudice ensues, he should, by being disfranchised be subject to so much loss (*a*).

MISCONDUCT in *one* corporate office is not a cause to remove the offender from *another*; thus if a capital burgher be appointed chamberlain of the corporation, and misconduct himself in *that* office, this is not a good cause to deprive him of the office of capital burgher (*b*).

So, where a recorder is also a justice of peace, and a voter for a member of parliament, misconduct in either or both of the two latter characters, is not a good cause to remove him from his office of recorder.

SERGEANT Burland being recorder of Wells, and also a justice of peace, and a voter for a member of parliament, went down from London to vote at an election: Mr. Tudway was mayor, and Mr. Keate the senior alderman; the sheriff delivered the precept to the latter; the former demanded it, and the latter refused to deliver it: Tudway then ordered the serjeant, *as recorder*, to administer the oath to him as returning officer, and not to Keate: the serjeant said he would *disobey* that order, and, on his own motion

(*a*) 11 Co. 98 b.

(*b*) Rex v. mayor, &c. of Doncaster, 2 Ld. Raym. 1564.

and

and propofal, as was alleged, adminiftered the oath to Keate, as well as to the mayor: the mayor upon this adjourned the poll to the affize hall: the ferjeant opposed the adjournment; and advised and affifted to continue it where it was. In confequence of which, two diftinct polls were taken.—For this, as well as for another caufe, the corporation removed the ferjeant from the office of recorder.

LORD Mansfield obferved, on this cafe, that the charge of mifbehaviour at the election was the adminiftering the oath both to Keate and the mayor; though the mayor commanded the ferjeant to adminifter it only to himfelf: that the mayor having adjourned the poll, the ferjeant declared his opinion “that the mayor could not adjourn without the confent of the candidates;” and that he continued with Keate, taking the poll at the former place.—

There was no charge at all of any *corrupt motive* for his giving this advice, or doubting of the legality of the mayor’s prefiding: it was plain, that his opinion was fincere, becaufe the candidate, whole caufe he efpoufed, rifqued the fate of his election upon it; and thofe who voted for that candidate, did not vote before the mayor and Keate both, but only polled before Keate. The ferjeant had nothing to do at that meeting as *recorder*; nor was this a *corporate meeting*. The mayor had the return, and might have made it without the recorder. But, as recorder, the ferjeant was a juftice of peace. Had he then mifbehaved as a juftice of peace? Two perfons claimed the return; and both demanded to have the oath adminiftered: he adminiftered it to both. This was furely no breach of the duty of his office. The mayor adjourned the poll. The ferjeant had nothing to do with the adjournment, but as a *voter*: he gave his opinion: his opinion was wrong: they

who were his friends suffered by it. This could be no breach of his corporate duty (a).

GROSS ignorance of the law is a good cause to remove a recorder, because it is his principal business to advise the corporation in matters of law (b): but it is no cause to remove him that he was mistaken in a single instance, or that he refuses to give a *positive* opinion, or to advise a *particular part* of the corporation, for his duty is only to advise the whole body, and in a reasonable manner (c).

So, a *general* neglect, or refusal to attend the duty of such an office, is a reason of forfeiture (d).

IN the case of Serjeant Whitaker, recorder of Ipswich, it appeared, that the serjeant, the bailiffs, and one of the justices elected out of the portmen, on the 6th of January, 1702, "appointed that they would hold" (e) a session of the peace for the borough, in the Motehall there, on the 14th of January following, at two in the afternoon: that a precept was issued out by the same persons accordingly the same day to the serjeants at mace, to return a grand jury, and summon all officers whose attendance was necessary, and to proclaim the session; that the session was proclaimed accordingly, by the crier; that Serjeant Whitaker had notice of all the premises; and that the bailiffs and the other justice, the jury and all other persons necessary to the holding of a session, except the serjeant, assembled at the day and place appointed, and there remained several hours, and were ready to have held a session of the peace for the borough, if the serjeant had been present; but that the serjeant did not come at the hour appointed, nor all the afternoon, to the place appointed, "although solemnly

(a) *Rex v. corporation of Wells*, 4 Bur. 1999.

(b) *Lord Hawley's case*, 1 Ventr. 143.

(c) 2 Ld. Raym. 1238.

(d) *Pr. Ld. Mansfield*, 4 Bur. 204.

(e) *Appunctuabant quod illi tenerent.*

demanded"

demanded" (a), but voluntarily, and without any reasonable cause, absented himself, so that by reason of his absence the session could not be held according to the appointment and notice, "to the great detriment," as it was alleged, "of the bailiffs, burgessees, and commonalty, and against the duty of the serjeant's office:" and that for this, and a non-attendance under similar circumstances on a subsequent day, among other causes, the serjeant was removed from his office.

To this it was objected, that a session of the peace might be held *without* the recorder, as two justices might hold the session, and it did not appear that the recorder was of the quorum; and further, admitting that the session could not be held without him, yet they ought to have sent for him, and shewn some *special* damage to the corporation from the session not having been held: but it was answered and resolved by the court, first, "that admitting the presence of the recorder not to be necessary by the charter to the holding of a session of the peace, yet he must attend, because it was the intent of the charter in creating such an officer, that he should assist the justices in matters of law; and the latter, though they had power, might be afraid to proceed to hold a session *without* their recorder: and secondly, that this being a public office, concerning the administration of justice, the officer was bound to attend at his peril, and non-attendance was a cause of forfeiture, though no inconvenience ensued from it" (b).

In the case of Serjeant Burland, recorder of Wells (c), it appeared that the serjeant's *general* residence was in London, and had been so for six or seven years, that he went down to Wells, on occasion of an election, in December 1765;

(a) Licet solemniter exactus.

(b) Regina v. Ballivos, &c. de Gippo. 2 Ld. Raym. 1233, 1237, vid. vol. 1, 326, 447.

(c) Ante, p. 80, 81.

that while he was in the town, he had notice to attend at a session to be held on the 13th of January, 1766, and that, in fact, he did not attend; but that the reason of his non-attendance, at that time, was, that he had received notice that no session *could* be held on that day, on account of the illness of Mr. Miller, another justice, without whose presence the session could not be held, as the mayor was gone to London; that notwithstanding this, he had remained in the town for the *purpose* of attending the session, should Mr. Miller recover in time; but that not having been the case, he had not, in fact, attended, as his attendance would have been nugatory.

It was made a further subject of complaint against the serjeant, that he had *neglected* to attend at the next quarter session, on the 7th of April, though it was not pretended that he had any particular personal notice to attend, but it was contended, that he was bound by his *duty* to attend, as the 7th of April was well ascertained to be the *usual* day of holding this session:—in answer to this charge, he alleged, that he was not at that time in the town, and that, as there was a sufficient number of justices without him, and their jurisdiction did not extend to felonies, and as, on ordinary occasions, no *particular* business was expected to come before them, his presence was not essentially necessary.

LORD Mansfield, after stating the principal circumstances of this case, delivered the opinion of the court to this effect: that though a *general* neglect, or refusal to attend the duty of such an office, where the neglect was *determined*, and the refusal wilful, was a reason of forfeiture; yet a single instance of non-attendance, where no particular business was expected, and where none, in fact, occurred, was a very different case; that he thought the law was well laid down by Serjeant Hawkins, in treating of offences, by officers,

officers, by neglect or breach of duty: the serjeant said, "It is certain that an officer is liable to a forfeiture of his office, not only for doing a thing directly contrary to the design of it; but also for *neglecting* to attend his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those, by or for whom he was made an officer: and some have gone so far as to hold, that an office concerning the administration of justice, or the commonwealth, shall be forfeited for a *bare non-user*, whether any special damage be occasioned thereby or not. But this opinion doth not appear to be warranted by any resolution in point; and the authorities which are cited to maintain it, do not seem to come up to it" (a). His lordship then observed, that Hawkins referred to several books and cases, in his margin, and agreed with those authorities which say, "That he, who so far neglects a public office, as plainly to appear to take *no manner of care* of it, should rather be immediately displaced, than the public be in danger of suffering that damage, which cannot but be expected some time or other from his negligence."

'BUT nobody', continued his lordship, 'can say, or even imagine, that one single absence from a session, at which nothing of importance was likely to happen, can amount to *such* a neglect of a recorder's office, as to make him plainly to appear to take *no manner* of care of it'.—— Then, alluding to the case of Serjeant Whitaker (b), he observed, 'that it was perfectly consistent with that case to say, "that *barely* being absent was not a cause of forfeiture."' 'That case, he observed, arose on the motion of Serjeant Whitaker, from the office of recorder of Ips-

(a) Vid. 1 Hawk. Leach, p. 310, c. 66.

(b) Ante, p. , vol. 1, 445—447.

wich, for non-attendance, among other causes, at two distinct sessions of the peace, both appointed by himself, and at a time too when, as it appeared by the return, he was present within the borough. The corporation there stated, "not a *single* absence, but *two* different neglects, at *two* distinct sessions."—They stated, verbatim, the notice they gave him to appear and answer, why he did not attend and assist, and that when he appeared to answer, all the reason he gave was, "that he expected to be sent for when they were ready;" plainly, therefore, it appeared that he was in the town; and it was as plain that he *wilfully* and *voluntarily neglected* to attend at the sessions.'

HIS lordship then stated the two exceptions taken to the cause of forfeiture, so assigned, in not attending to hold a session of the peace, and the answer and resolution of the court on those exceptions; and observed, "that it was to those two exceptions only, that the opinion of the court was applied; and that it must be understood as qualified and restrained to the subject then in debate before them. The question was not, he said, "*how many* instances of non-attendance of a *non-resident* recorder should amount to a forfeiture, but whether his *wilfully* absentsing himself when in the town, was so."

IT was not argued, "whether his presence was *necessary* to the holding of the session," though it appeared, on the return, that it was. But it was urged, on the part of Serjeant Whitaker, "that, admitting it to be so, yet they ought to have sent for him; and also, that they ought to have shewn some special damage to the corporation, arising from not holding the session." The corporation said, "that no particular notice was necessary;" and, "that being in the town, he ought to have attended this session of his own appointment." 'There is no doubt,' continued his

his lordship, 'that non-attendance is a cause of forfeiture; but the question is, "*what sort of non-attendance?*" This was not the question in the case of Ipswich; Serjeant Whitaker appointed the session himself; was actually then upon the spot; and *voluntarily* and *wilfully* absented himself. Being merely absent *once* from a session, without any particular circumstance, is no cause of forfeiture. In the case now before the court, the recorder resided in London, and had no particular notice to go down to hold the session; the corporation had been satisfied with his *former* absence; and there was no particular reason for his attendance at this particular time; there was a sufficient *quorum* on the spot. Therefore, this was not a gross negligence sufficient to forfeit his office (a).

THOUGH an offence may seem to have some relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cause of disfranchisement: thus, the misemployment or non-payment of money, belonging to the corporation, is no sufficient cause, the corporation having a remedy by action (b); nor, a refusal to pay his proportion of the expence of renewing the charter (c); nor a refusal by a liveryman, to make the usual payments for support of the company (d); nor general disobedience to the laws and orders of the corporation; nor, as it would seem, the breach of any particular bye-law (e).

THE distribution into three different classes, of the offences, for which a corporator or corporate officer may be disfranchised or removed, respects, principally, the power

(a) Rex v. the corporation of Wells, 4 Bur. 1999.

(b) 1 Ld. Raym. 226.

(c) 1 Sid. 282.

(d) Comyn's Dig. Franchise, F. 33, says Semb. Cont. Raym. 446.

(e) 2 Ld. Raym. 1566.

of trial: those offences hitherto considered, belong to the first class; and for these, the power of trial as well as amotion belongs, exclusively, to the corporation (*a*).—But, for offences of the second class, as it is the loss of *credit*, which renders them the ground of forfeiture, the corporation cannot disfranchise or remove, without a previous conviction at common law; for, as such offences have no relation to the corporate character, the corporation cannot try the truth or falsehood of the accusation: it is for this reason, that it is no cause to remove or disfranchise a man, that he is *indicted* of felony, perjury, forgery, or other infamous crime, because he may be acquitted of the charge (*b*).

WITH respect to the necessity of a previous conviction, as the ground of amotion, writing a libel by one member of a corporation against another, has been ranked with the offences of this second class (*c*).—As this has no relation to the corporate duty of the offender, unquestionably it can be no ground of amotion *without* a previous conviction.—And I apprehend it would be too much to lay it down as a *general* proposition, that, *after* conviction, writing a libel is a good cause of amotion; unless it must be taken for granted, that to be convicted of merely writing a libel must render a man so infamous, as to make him unfit to ~~enjoy~~ any franchise whatever (*d*).

WITH respect to offences of the third class, there has been great difference of opinion, nor does the point seem yet to be well settled, “whether, for such offences, the offender can be removed without a previous conviction at common law?” The great difficulty, in such cases, seems

(*a*) B. R. H. 154. 1 Bur. 539.

(*b*) Style, 479.

(*c*) Vid. Lane's case, 2 Ld. Raym. 1304. 11 Mod. 270. Fortesc. 275, et vid. B. R. H. 155. 1 Bur. 539.

(*d*) Vid. ante, p. 76, 78.

to be the possibility of a difference of determination by two different jurisdictions, as the party might be removed by the corporation, for the same fact, of which he might afterwards be acquitted on a trial by jury.——Thus, if a man produce a riot at a corporate meeting, and thereby interrupt the business of the corporation, this is an offence against his corporate duty, and at the same time an offence indictable at common law; now, it might happen, that a corporator might be removed for such an offence imputed to him, and yet he might be acquitted of it on a subsequent indictment.——There is a case, however, in which a removal for a riot in the council chamber, without previous conviction, is said to have been held good (*a*).

IN the case of the Queen against the mayor and corporation of Newcastle, commonly called Parrot's Case, the corporation, to a mandamus, commanding them to restore the prosecutor to the office of alderman, returned, that he corruptly bribed one of the burgesses to vote for a member of parliament, and this was held to be a good cause of disfranchisement, *if* there were a *precedent* conviction; “and so it rested,” says Lord Hardwicke, “for I do not find it was determined” (*b*).

Two cases of motion for bribery, at an election of mayor, arose in the city of Carlisle about the same time (*c*); in one of which (*d*) the court is made to say, “bribery is a public offence, and the person guilty of it may be punished at law;” “and the chief justice,” continues the report, “was at first of opinion, “that the defendant* might be

(*a*) Rex v. Yates, Style 477, cited 8 Mod. 101.

(*b*) Reg. v. mayor, &c. of Newcastle, Mich. 8 Ann cited by Ld. Hardwicke, B. R. H. 155.

(*c*) From the 7th to the 9th of G. 1.

(*d*) Rex v. Hutchison, 8 Mod. 19.

* It ought to have been “prosecutor.”

removed from his freedom, for this reason, because bribery is against the interest of the corporation, and against the oath of fidelity, which the defendant made to them, when he was admitted to his freedom there.”—But the *better* opinion was, “that this was an offence at law, and not relating to the duty of his office; and therefore he could not be disfranchised before a conviction according to the ordinary course of law; for if he should first be disfranchised, and afterwards tried at law for this crime, and be acquitted, he would suffer damages without any remedy.”

YET immediately after it is added: ‘However, it was admitted in this case, that the defendant might be removed *before* conviction at law, if the offence *did* relate to the duty of his office; and this might be *by virtue of that power which they have by their charter*, to determine among themselves whatever shall be against the public good of the corporation, and certainly bribery is an offence against their public good; but yet, to prevent clashing of jurisdictions, ’tis expedient that the party should be convicted at law before he be disfranchised; to which the court inclined.’

By one report of the other case (a), three judges against the chief, are said to have held, that for this offence a man might be removed *before* conviction, “because, if he could not, a corrupt member would in the mean time have a vote in all corporate acts, which might be prejudicial to the corporation.”

THE Chief Justice, according to this report, held that as this was a crime punishable at law, the offender could not be removed for it before conviction; and observed, “that a juster trial might be had in the courts in Westminster, than by a mayor and common councilmen in a

(a) Rex v. mayor, &c. of Carlisle, 8 Mod. 99—103. \

corporation,

corporation, who are generally corrupted, and use arbitrary methods of trial."—But in a marginal note, he is said to have afterwards retracted his opinion in the case of the mayor of Tiverton, where he held, "that bribery was a sufficient cause to remove a man from his office *before* conviction."

IN another report of the same case (a), the court are said to have been *unanimously* of opinion, "that though this was an offence indictable at common law, yet being *also* a great offence against the duty of his office, he might be removed *without* any conviction at law."

THE question, how far a previous conviction was necessary in such cases as these, was again agitated in the time of Lord Hardwicke, but was left still undecided.—To a mandamus directed to the mayor and burgessees of Derby, commanding them to restore one Sadler to the freedom of the borough, of which he had been deprived; it was returned, "that on the 14th of October, 1718, the mayor, aldermen, and capital burgessees were assembled in common council in the guildhall of the town, to consult about the common good of the corporation, and being so then assembled, the said Sadler, and several other persons, contrary to his oath and the duty of his office, in sight of the mayor, aldermen, and common council, riotously assembled in the street over against the common hall, to the disturbance of the common council, and did then and there assault the constables appointed to keep the peace, and did then and there assault F. Cockayne, Esq. an alderman and justice of peace of the said borough, as he was going to the common hall, and *prevented him from going to the business of the corporation, and did terrify, assault, and hinder several other persons from going to the common hall:* and though the

(a) Fortesc. 200.

mayor made proclamation for them to depart, Sadler made a great noise and shouting to deter and hinder the cryer from making the proclamation, and would not depart, but with great shouts did hinder the mayor in the business aforesaid."

AMONG other things, it was objected to this return, that the offence set forth in it was a crime indictable at common law, and that therefore Sadler should have been convicted by a jury, before they proceeded to disfranchise him.

LORD Hardwicke, in delivering the opinion of the court, after alluding to the distribution of offences into the three classes before mentioned, and observing on the difference of opinion that had prevailed, with respect to the necessity of a previous conviction in those of the third class, took a view of the cases that had occurred on the subject; and concluding with that of Carlisle just mentioned, said, but from what authority does not appear, that on the return the court was equally divided; Lord Chief Justice Pratt and Mr. Justice Powis holding that a precedent conviction was necessary; but Mr. Justice Eyre and Mr. Justice ——— being of a contrary opinion, and holding, that for things which are merely offences against the common law, a precedent conviction *is* necessary, because in such case the removal is solely on account of the party's infamy; but that for an action prejudicial to the corporation *as well as* contrary to the common law, the party might be disfranchised *without* a precedent conviction; "and so," said his lordship, "that case rested; so that it is hitherto quite *unsettled*, and it being a point of *consequence*, it is not *fit* to be settled, till it come directly before the court; but in this case there are offences against his *duty* returned; for the *true* ground of his forfeiture in
this

this case is, that he endeavoured to *hinder one of the aldermen from attending the common council, and hindered others from going thither to attend their business, and refused to depart at the command of the mayor by the cryer*; and the riot is but a circumstance attending his breach of duty, for he might have been acquitted of the riot on an indictment, and have been guilty of a breach of his duty; or he might have been guilty and convicted of the riot, and yet have been innocent of a breach of his duty to the corporation" (a).

LORD Mansfield, in the case of the King and Richardson (b), took notice of the three different classes of offences for which a corporator may be disfranchised, and distinguished between the first and second class with respect to the necessity of a previous conviction; but laid down no rule with respect to the third class, so that notwithstanding that case, the point remained equally undetermined as before.

IN the case of the King and the corporation of Doncaster (c), the cause alleged for the removal of Wilsford was, "that he had unlawfully, knowingly, and wilfully, and contrary to the duty of his office of one of the capital burgeses of the borough, and without the consent of the then mayor, aldermen, and burgeses of the borough, and also without the consent of the then common council of the said borough, defaced and obliterated the ENTRY of a resolution particularly described, which had been made in a book kept by the corporation, for the purpose of entering the orders and resolutions of the mayor, aldermen, and burgeses."

(a) Rex v. mayor and burgeses of Derby. B. R. H. 153.

(b) 1 Bur. 538.

(c) 2 Bur. 738, vid. vol. 1, 442, 449.

It was contended, that, even admitting this cause of amotion to be in its nature sufficient, yet there ought to have been a *previous* conviction at common law; this offence being, as it was alleged, both an offence against the duty of his office as a corporator, and *also indictable* at common law; and the language of Lord Hardwicke, in the case of Derby before mentioned, was repeated, to shew that his lordship considered this point as unsettled: on which Lord Mansfield observed, that corporation law ought to be *well* settled, and said, he was therefore willing to hear the case argued a second time; but it was afterwards determined on another point; so that this question still remains undecided.

It has been asserted, that, after conviction, the King might, by writ issuing out of the court where the conviction remains, or out of Chancery, command the corporation to discharge the party convicted (*a*); but this doctrine has been justly disregarded (*b*).

In some instances, too, the crown has reserved to itself the power of removing at pleasure all or any of the principal officers of the corporation; but whatever may be said as to the invalidity of such a reservation, as being repugnant to the purpose of the charter, such a power cannot certainly be exercised to such an extent as to destroy the whole body at once, and render the election of other officers impossible (*c*).

(*a*) Sawyer's Arg. Quo War. 22, cited 1 Bur. 525.

(*b*) 1 Bur. 530. (*c*) Vid. Rex v. Amery. 2 Term Rep. 516—568.

SECTION X.

Of Bye Laws.

ALL bodies of men, united by common interest, and having affairs of common concern, must have some general rules for the regulation of their conduct, with respect to that interest and those affairs. Previous to positive constitution, neither any individual, nor any number of individuals, of any particular description, have a right to dictate to the community at large : the rules, therefore, which are to direct the general conduct, must be established either by the majority of the wills of the whole community, or by the resolutions of a select body to whom the whole community has delegated the legislative authority.—These general rules, when applied to all the inhabitants of a country united under one independent government, are called laws ; when applied to subordinate communities, they are called private ordinances, or bye laws.

THERE are some societies which are formed merely by the voluntary association of the members ; and there are communities which have a known description, and are recognised as forming part of the general constitution of the country : the former must have their rules or bye laws as well as the latter ; but they receive no aid from the general law of the land to enforce obedience to their rules, and they have no ultimate remedy against disobedience, but the expulsion of the disobedient member. But the general law of the land will enforce obedience to the bye laws of the latter, when duly made on a subject within their jurisdiction :

dition : thus the inhabitants of a parish or of a town not incorporated, may, without any custom to authorise them, make a bye law for the repair of the church, or of a highway, or concerning any thing which the *public* good requires to be regulated ; and in *such* a case the majority shall bind the whole (*a*). So, the residents in a leet may make a bye law relative to any thing which concerns the common interest (*b*). So the tenants of a manor may make bye laws to regulate the exercise of their right of common (*c*) : “ but this,” says Lord Coke (*d*), “ must be by virtue of a custom, because it concerns their own private profit, and not the public good : *and if there be a custom, then the greater part shall not bind the less, if it be not warranted by the custom : for as custom creates them, so they ought to be warranted by the custom.*” The first part of this sentence, taken by itself, seems to mean, “ that though there be a custom authorising the tenants of a manor to make bye laws, yet such bye laws shall only bind those who *actually* assent to them, unless there be *also* a custom that the majority shall bind the whole.” But the latter part, which is evidently given as a reason for the assertion in the former, seems to relate to the bye laws themselves, and to require only that they should not go beyond the custom which authorises the making of them ; so that the meaning of the whole sentence seems to be no more than this, “ that a bye law made by the majority shall not bind the minority, unless it be such a bye law as the custom warrants.”

HOBART expresses his doubts on this subject in these terms. “ Also the tenants of one manor may for their common or the like make bye laws. *But whether, if there*

(*a*) 5 C8. 63. a. Hob. 212. 3 Salk. 76. (*b*) Mo. 579, 584.

(*c*) 1 Rol. Abr. 366. Mo. 75. Hob. 212. (*d*) 5 Co. 63. a.

be a lord and court whereunto it belongs, that may be done, but in a court, and by consent of all the tenants, and with consent of the lord, and by prescription ——— is considerable" (a).—As a custom is required to authorise the tenants to make any bye law at all, it is apprehended, that no general rule can be laid down with respect to these circumstances, but that they must all depend on the custom of the *particular* manor: thus where a custom was alleged, by which "the steward of the manor held a court twice in every year, at which, on reasonable summons, all the commoners were used to appear, or be amerced; and the steward, out of the commoners, used to choose a jury to inquire of all purprestures and misfeasances within the common; and that the said jury had used to make ordinances concerning the well-using of the common; and that all those who had common, had used to be obedient to the performance of those ordinances, under a reasonable pain to be set down by the jury: this was held to be a good custom, and the bye laws made under it binding on the commoners at large (b); and it has been frequently admitted, that, by custom, the *homage* may make bye laws to bind the tenants of the manor, both freeholders and copyholders (c).

WITH respect to corporations, Sir Edward Coke says (d), "They cannot make ordinances or constitutions without a custom or the King's charter, unless for things which concern the public good, as reparations of the church or common highways, or the like."—But Hobart says, "that though power to make bye laws be given by special clause in charters of incorporation, yet that is needless; for it is

(a) Hob. 212

(b) James v. Tutney. Cro. Car. 498.

(c) Vid. Godb. 66, pl. 62. Dalison, 103. Lambert v. Thornton, 1 Ld. Raym. 91.

(d) 5 Co. 63. a.

included by law in the very act of incorporation, like the power to sue and to purchase; and as reason is given to the individual for the government of his conduct, so a body corporate must have laws as a politic reason to govern it" (a). And according to this opinion of Hobart, it has long been established that this power is necessarily incident to every corporation (b); and it extends to every subject in which the corporation are to exercise a right; to franchises *recently* granted, as well as to those which they have immemorially enjoyed, or which are coeval with their constitution; to those which are to be enjoyed beyond the limits of their ordinary jurisdiction, as well as to those which are confined within them: thus the sheriffwick of London and Middlesex is a franchise granted to the citizens within time of memory, long subsequent to their existence as a corporation, and to be enjoyed beyond the limits of the city; yet it was held, in the case of Vanacker, that they might of common right, without a custom, make a bye law concerning it (c).

BUT this power, like every other incidental power, is incident to the corporation at large, and not to any select body; yet where it belongs to the corporation at large, they may *delegate* it to a select body, who then become the representatives of the whole community, and may exercise it to the same extent that the whole community might do: it is frequently, however, given by charter to a select body by an express clause; but then the select body do *not* represent the whole community, and therefore, says Lord Mansfield, cannot assume to themselves what belongs to the body at large (d): and in a case where the legisla-

(a) Hob. 211.

(b) 1 Ld. Raym. 498, 1 Bur. 1829.

(c) City of London v. Vanacker, 1 Ld. Raym. 498, 9.

(d) 3 Bur. 1837.

tive power was given to a common council created by charter, he continues to observe, "that it is by no means to be compared to cases where there is a common council who are supposed to have been created by the *commonalty*, and therefore have in them the original power of the latter (a).

THE power of legislation may likewise be vested in a select body by custom as well as by the provisions of a charter: thus the courts at Westminster have often recognised a custom alleged in pleading by the city of London, "that if any customs in the same city prevailing and used, were in the whole, or in part, hard or defective, or any thing in the said city, newly arising, where remedy before that time was not ordained, should need amendment; the mayor and aldermen for the time being, with the assent of the *commonalty* of the said city in *common council* assembled, might ordain fit remedy as often as it should seem expedient" (b).

HERE it would seem, that the common council are the representatives of the commonalty, and, perhaps, it is to be presumed, that in many cases where the power of legislation is claimed by a select body, by custom or prescription, that select body is to be considered as having been originally constituted by delegation for that purpose, and therefore may make any bye law which the corporation at large might make.—But this is hardly to be presumed, where it appears that the select body, claiming the legislative power, is not elected by the suffrages of the community at large, but the vacant places are filled up by the survivors of the select body itself.

WHEN by the terms of a charter the legislative power is placed in a select body, and *given* in *general* terms;

(a) 3 Bur. 1837.

(b) Vid. case of the city of London, 1 Co. 121 b. Skin. 371. 1 Ld. Raym. 497. 3 Bur. 1323—and many other books.

or when it is *claimed* in general terms by prescription, by a select body, manifestly *not* the representatives of the whole community ; the principal difference between the power of a select legislative body so constituted, and that of the whole corporation, or of a *representative* body, seems to be this ; that the former can make no bye laws by which the constitution of the corporation may be affected, but that the latter, in some instances, *may* make such a bye law (a).

THE *incidental* power of making bye laws, it is evident, may extend to a greater or less number of objects, according to the nature and design of the corporation, and the object of its institution.—Where a power is *expressly* given to the *whole* body, and *particular* objects of legislation pointed out, it may be a question, whether the general power be not thereby abridged, and confined to those particular objects ? Where the power is expressly given to a *select* body to make bye laws in *particular* cases, it may be a question, whether that select body can go beyond those particular cases ? or whether, if they cannot, the general power of making bye laws on subjects within the scope of the institution, and beyond those particular cases, still remains in the corporation at large ?—To none of these questions do the decided cases seem to afford an answer, and yet, as general questions, they may be supposed of some importance.—In one case, indeed, in which the power of making bye laws was expressly given to a select body, the mayor, aldermen, and twenty-four common councilmen, *in the stead, for and in the name of the whole corporate body* : in which, in the return to a mandamus, it was alleged, that certain bye laws were *duly made* by the mayor, aldermen, and *commonalty*, in *due manner met and assembled* ; and in which the jury found, that on a particular day, the then mayor

(a) Vid. ante, p. 26—31.

and aldermen and commonalty *did* in due manner *meet and assemble*, and *in due manner* make the bye laws: the court held, that it must be presumed, that these bye laws were made by a competent authority, because the jury having found, "that the mayor, &c. *did in due manner* meet, and *in due manner* make the bye laws," they *might* have been made by the select number acting in the *name* of the *whole* corporate body; and therefore it must be so *intended* (a).— But this does not seem to furnish any general principle from which an answer may be given to any of the questions above stated.

It seems, however, that where the power of making bye laws is vested by charter in a select body, a bye law made by that select body, in conjunction with persons of another select description, is void, whatever might be the case with respect to a law made by the whole corporate body.—Thus, where the inhabitants of a town were incorporated by the name of Bailiffs and Burgeses, and there were twelve capital burgeses, and twelve common burgeses, beside common freemen, but the power of making bye laws was vested in the bailiffs and *capital* burgeses only; and the bailiffs and *all* the burgeses, including the *capital* and *common* burgeses, made a bye law: this was one reason given for holding the bye law to be void (b).

So, where the power of making bye-laws was *expressly* given to the mayor and aldermen; and they, *with the assent of the commonalty*, made a bye-law, which altered the constitution of the corporation; Lord Mansfield said, *the body at large* had no power to make bye-laws, because that power was given by the charter to a *select* body (c).

(a) Green v. mayor of Durham. 1 Bur. 127, 131.

(b) Parry v. Berry. Comyn's Rep. 269.

(c) Rex v. Head, 4 Bur. 2515, 2521.

IN another case, we are told, "that a corporation has," indeed, "an implied power to make bye laws; but that where the charter gives a company a power to make them, they can only make them in such cases as they are enabled to do by the charter; for that such power given by the charter implies a negative, that they shall not make bye laws in any other cases" (a).—But the example given, to illustrate this position, only shews, that when an express power is given to make bye laws for the conduct of the affairs of the corporation, they cannot make bye laws on subjects not within the design of their institution; a limitation, it is conceived, implied in the very nature of the thing, and which no *implied* or *express* negative was necessary to establish.

This was the case of the Hudson's Bay Company, who were made a corporation by charter, and were thereby empowered to make bye laws for the better government of the company, and for the management and direction of their trade to Hudson's Bay: "which," it was said, "implied a negative that they could not make any *other* bye laws; much less could they make bye laws in relation to projects of insurance, which by act of parliament were declared to be illegal" (b).

It is apprehended, that *without* this implied negative, arising from the power of making bye laws being expressly given, they could not have made any bye law on any subject which did not relate to their trade to Hudson's Bay; because any such bye law would have been foreign to their institution.

So, when a corporation is erected by act of parliament, for a particular purpose, and a power of making bye-laws relative to the objects of the institution, is expressly given,

(a) Per Ld. Chancellor Macclesfield. 2 Pocr. Williams, 209.

(b) Vid. 6 G. 1, c. 18. Child v. Hudson's Bay Company. 2 P. W. 207.

it is apprehended, that this neither enlarges nor abridges the power they would have had without such an express clause.

ELERMOSYNARY corporations differ from others with respect to this power of legislation; for the founder prescribes the rules and statutes by which the members are to be guided in the whole of their corporate conduct; nor have they any power to alter, modify, or amend them: It has even been held, that the founder himself, after having given a body of statutes to the college of his foundation, cannot, and that his successor cannot, give new statutes or alter the old, without an authority expressly reserved for that purpose (*a*). But this must be understood to mean, that he cannot, without such reservation, alter them without the consent of the college; for if the college consent to receive a new set of statutes, there seems no good reason why they should not be bound by them; and, in fact, there are many instances of colleges acting under new statutes, given by the successor of the founder, where it does not appear there was any original reservation of a power to alter or repeal the old (*b*).

ALL bye laws have their obligation from the consent, either express or implied, of the parties who are to be bound by them (*c*); and, therefore, every member of a corporation is bound by the bye-laws of that corporation, without express notice of them, nor is it an objection to his being bound by any particular bye-law, that he was not a member of the corporation at the time it was made (*d*).

WITH respect to the power of a bye-law to bind strangers, there is a distinction between corporations

(*a*) Skin. 513.

(*b*) Vid. Dr. Bentley v. bishop of Ely, Fitzg. 305. Str. 912. St. John's College, Cambridge, v. Toddington, Clerk. 1 Bur. 158, 197, 201.

(*c*) Sir T. Jones, 145.

(*d*) Lutw. 405.

which are vested with a local jurisdiction, and those which are established only for some particular purpose, and have only a jurisdiction over their own internal concerns.

WHEN the corporate body has a jurisdiction over certain limits, a bye-law made by them for the public good, and whose object is general without being limited to people of any particular description, binds every body coming within the limits of the jurisdiction, whether strangers or members of the corporate body (*a*); for every man, says Holt, who comes within the limits of the local jurisdiction of a corporation, must take notice of their bye-laws at his peril (*b*); thus, a bye-law imposing a certain duty as toll, for a good consideration, within a town corporate, must be taken to bind strangers coming within the scope of it, as well as members of the corporation; as a bye-law, imposing a certain toll on every twenty bushels of malt, brought by water, and sold in the market-place, at Bristol.

So, a bye-law made by such a corporation, affecting only persons of a particular description, shall bind persons coming under that description, strangers as well as inhabitants or members of the corporation.

THUS a bye-law of the city of London, "that no citizen, freeman, or *stranger*, should expose any broad cloth to sale within the city, before it should be brought to Blackwell-Hall to be viewed and searched, so that it might appear whether it was saleable or not," was held good to bind strangers as well as citizens (*c*).

So, a bye-law, by the mayor and common council of Exeter, "that no butcher, or other person, should, within the walls of the said city, slaughter any beast," binds the inhabitants for the time, as well as persons who are free of

(*a*) Brownl. and Goulds, 179.

(*b*) Per Holt, Skin, 35.

(*c*) Chamberlain of London's case, 5 Co. 62 b.

the corporation (*a*). And many other examples of the same kind will occur in the course of this section.

A CORPORATE company may have a jurisdiction, either by prescription or by act of parliament, over all of the same trade or profession, within certain local limits; thus the college of physicians have a jurisdiction seven miles round London, and the cutlers' company, of Sheffield, a jurisdiction over persons practising that trade, within the lordship or liberty of Hallamshire, and six miles round (*b*); and therefore a bye-law, regulating the practice of the profession, or trade, within those limits, will bind strangers as well as members of the college or company.

BUT where a corporate company have not a *local* jurisdiction, their bye-laws cannot bind persons exercising their trade who are *not* members of the company.—On this principle, it was held, that a bye-law of the butchers company, of London, “that no butcher or person, being a stranger, should sell any veal within the city, unless he should dress the kidneys in the same manner that the kidneys of sheep were dressed,” was held not to bind a person not a member of the company (*c*). But in the same case, it is said by the court, that a bye-law to suppress fraud, or remedy any general inconvenience arising from the practice of a foreigner, as corruption, or the like, in the sale of their meat, must have bound a stranger: but then, it is apprehended, it must have been made by a corporation or company, having a local jurisdiction.

So, a bye-law by the corporation of Trinity House, “that every mariner, within twenty-four hours after an-

(*a*) *Pierce v. Bartrum*. Cowp. 269.

(*b*) *Kirk v. Nowill and Butler*. 1 Term Rep. 118. Vid. the case of the college of physicians. 4 Bur. 2186, and 5 Bur. 2740.

(*c*) 1 Bullstr. 11, 12.

chorage, in the Thames, shall put his gun-powder on shore," does not bind; because the corporation has no jurisdiction on the Thames (*a*).

So, a bye-law, by the corporation of horners, "that none of the company shall buy horns within twenty-four miles of London, but of two persons, by them appointed," is void; among other reasons, because they have not jurisdiction within twenty-four miles (*b*).

So, a bye-law, of the university of Oxford, "that every one, *privileged or not privileged*, found in the street after nine o'clock at night, without a reasonable excuse," shall not bind the townsmen (*c*).

So, a bye-law, by the homage or tenants of a manor, does not extend to persons who do not hold of the manor (*d*).

It is on the same principle, want of jurisdiction, that a bye-law, "imposing a penalty on any *person* who shall refuse to undertake an office within a corporation," is void; because it may include strangers (*e*).

It is not uncommon for the corporation of a *particular* trade, to admit, as members, men who practise other trades, or who have no trade at all.—In which case, a bye-law, "which relates merely to the internal regulation of the affairs of the company, and does not infringe any principle which must concur in forming the validity of a bye-law in general," must bind all the members equally; otherwise the admission of the foreign members could answer no other purpose than that of conferring on them the general pri-

(*a*) Semb. 2 Jon. 145, cited Com. Dig. Tit. bye-law, C. 2.

(*b*) 3 Mod. 159.

(*c*) Dodwell v. University of Oxford, 2 Vent. 33, 34.

(*d*) 1 Rol. Abr. 366. Sav. 74, vid. Carth. 179. 1 Salk. 193.

(*e*) Mayor of Oxford v. Wildgoose, 3 Lev. 293, vol. 1, 392.

vileges, without promoting the policy of the corporation. But where the bye-law respects the mode of conducting a trade, it can extend no further than that particular trade, for the purpose of which the corporation was created.— A bye-law, that should attempt to regulate the conduct of any foreign member, in his trade, which is not the trade of the corporation, would certainly be void (*a*).

ALL bye-laws must be reasonable and consistent with the general principles of the law of the land; and their reasonableness and legality must be determined by the judges in the superior courts, when they are brought properly before them (*b*).

By ft. 15 H. 6, c. 6, after reciting, that “masters, wardens, and people of guilds, fraternities, and other companies incorporate, in several parts of the realm, had often, by colour of rule and governance, and other terms in general words, to them granted and confirmed by charters and letters patents, of the King’s progenitors, made many unlawful and unreasonable ordinances, as well of things of which the cognisance, punishment, and correction, belonged only to the King, lords of franchises, and other persons; and by which the King and others were disherited of their profits and franchises, as of things which frequently, in confederacy, were made for their singular profit and common damage of the people:” it was enacted, that from thenceforth “no such masters, wardens, or people, should make or use any ordinance which should be to the *disherison of the King’s franchises, or of others, or against the common profit of the people, nor any ordinance of charge, unless it were first discussed and approved for good and reasonable, admitted by the justices of peace or chief governors of the*

(*a*) Vid. Mo. 579, 585, 6.

(*b*) Dict. Ld. Raym. 114.

cities, boroughs, or towns, where such guilds, fraternities, and companies were, and before them entered of record, under pain of forfeiting their charters, and paying a fine of 10l. to the King for every ordinance made or used to the contrary." And this statute was to continue during the King's pleasure.

By st. 19 H. 7, c. 7, after reciting the preceding act, and that it was expired; it was enacted, "that no masters, wardens, and fellowships of crafts or mysteries, nor any rulers of guilds, or fraternities, should take upon them to make, or to execute any acts or ordinances by them theretofore made, *in disheritance or diminution of the prerogative of the crown*, or of others, nor *against the common profit of the people*, but that the same acts or ordinances should be examined and approved by the chancellor, treasurer of England, or chief justices of both benches, or three of them, or before both the justices of assize in their circuit or progress, in that shire where such acts or ordinances were made, on pain of forfeiting 40l. for every time that they should do to the contrary."

NOTWITHSTANDING these statutes, it has been determined (*a*), that if an ordinance be reasonable and legal in itself, it may be put in execution without having been allowed; but Rolle (*b*) says, "it seems the penalty of 40l. shall be forfeited, though the ordinance be not void."—This opinion, however, does not seem to be well founded; for, by the words and obvious meaning of the statutes, the forfeiture is incurred only by executing, without the requisite allowance, an ordinance in *disheritance or diminution of the prerogative of the King, or of others, or, against the common profit of the people*: but an ordinance, which is "reasonable and legal in itself," cannot come under this description.

(*a*) 5 Co. 63 b.

(*b*) 1 Rolle Abr. 363.

IT has, however, been frequently determined, "that, if a bye-law be bad in itself, it cannot be enforced, though it has been allowed, according to the statute (*a*), and Sir Edward Coke observes (*b*), "that this statute does not corroborate any of the ordinances made by any corporation, which are so allowed and approved, as the statute directs, but leaves them to be affirmed as good, or disaffirmed as void, by the law; and that the sole benefit which the corporation obtains by such allowance, is, that it shall not incur the penalty of 40*l.* if the ordinance be put in execution." And when it was said, in argument by Sir Bartholomew Shower, that a bye-law, which was the subject of discussion, had been signed by Lord Chancellor Finch, the court answered, "it was never the better for that, for that was done of course; so we use to do in the circuits, but if the ordinance be not good, the parties must look to that at their peril" (*c*).

IF a bye-law be contrary to the general laws of the kingdom, it is void, though justified by the terms of the charter; for all bye-laws, says Hobart, must ever be subject to the general law of the realm, and subordinate to it; and if the King, in his letters patent of incorporation, make ordinances himself, they are subject to the same rule of law (*d*).

A BYE-LAW made by a corporation, created by letters patent, imposing the forfeiture of goods, is void, even if the letters patent authorise such a bye-law; so an express grant of such a power, in letters patent, was adjudged void in a case in the 41st of Elizabeth, where it appeared that King Henry the sixth had granted to the corporation of dyers, in

(*a*) Vid. Moore, 577. Norris v. Staps, Hob. 210. Brownl. and Goulds, 48. 1 Term Rep. 118.

(*b*) 11 Co. 64 b.

(*c*) Comb. 222.

(*d*) Vid. Hob. 210.

London, power to search, &c. and if they found any cloth dyed with logwood, that they might seize the cloth as forfeited (*a*); and the reason given for this, is, that such a power is contrary to the 29th chapter of magna charta; for that goods and chattels are included in the prohibition, that "no man shall be disseised of his freehold."

NEITHER can a corporation, created by act of parliament, make such a law, unless the power be expressly given by the act (*b*).

A BYE-LAW for levying money on the subject in general, without any benefit to the party charged, is void, because, by the general law of the land, no money can be levied on the subject, but by act of parliament (*c*).

BUT where the law of the land throws a burthen on the particular society, of which a man is a member, a bye-law, assessing a sum on the individuals for discharging that burthen, is good: as a bye-law assessing a sum on the parishioners, or townsmen, for the repair of a church or a highway (*d*). So, a bye-law assessing a sum for pontage, murage, or other duties to be paid by the borough; or for cleaning the streets (*e*).—So, a bye-law, "that every inhabitant of St. Alban's should pay a reasonable sum for building the courts, when Queen Elizabeth appointed the term to be held there (*f*).

WHEN a corporation are bound to repair a bridge, it may be a question, how far they may impose a tax on the inhabitants within their liberties, but not members of the

(*a*) *Waltham v. Austin*, 8 Co. 125, a. 127 b. 2 Inst. 47. 1 Bulstr.

11, 12.

(*b*) 1 Term Rep. 118.

(*c*) Vid. the case of *quo war*. Treby's arg: 29, Sawyer's arg. 42.

(*d*) Vid. *Jeffrey's case*, 5 Co. 66 a. et ante, p. 96.

(*e*) Mo. 580.

(*f*) *Clark's case*, 5 Co. 64 a.

corporation.

corporation. It is apprehended this must depend on the circumstances of each particular case.

A RULE was granted against the mayor of Tenterden, calling on him to shew cause, why an information should not be exhibited against him for taxing several persons who lived out of the limits of the corporation, to contribute to the building of a bridge, and to other charges arising within the corporation; he shewed for cause, that though the persons thus taxed did not live within the corporation, yet they dwelt within the liberties, and were intitled to the like privileges as those who lived within the corporation; one of which was to be exempted from all taxes in the county at large; so that it was reasonable they should be contributory to the charges within the corporation, as they had the benefit of its privileges; and that, beside this, the tax in question had been paid by such out-dwellers time out of mind.

THE court directed, that this matter should be tried on an information, for two reasons; the one, that a single person might not be able to contest the matter, in an action, against the corporation; the other, that whether a verdict was given for or against such single person, it would not end the contest (*a*).

A BYE-LAW of a company, "That every member elected to an office, shall on or before his admission, pay a sum of money to the funds of the company," is a good bye-law.—Thus, a bye-law of the vintner's company, in London, "That every member chosen on the livery, shall, before his admission, pay a sum of 3*l.* 13*s.* 4*d.*" has been frequently held good (*b*).

(*a*) 8 Mod. 114.

(*b*) Raym. 446, 1 Bur. 234, vid. vol. 1, 385, 389.

So, a bye-law, imposing a fine on a person elected to an office and refusing to undertake it (*a*), or refusing to take the oath appointed to be taken by the corporation act; for his refusal to take the oath, is a refusal to do that without which the office is void, and cannot be held (*b*).

A BYE-LAW, "That, on the annual appointment of the officers of a corporate company within a town, they should provide a convenient and competent dinner for all the masters and brothers of the company, and that every one who should be absent on that day, should pay a like proportion to the common stock, with the master at the dinner, under a penalty of 3s. 4d." has been held good (*c*).

BUT a bye-law made by a *new* corporation, "That a person chosen steward shall provide a dinner for the corporation, on a certain day," has been held void, unless it appear that it is for the purpose of the corporation assembling to choose officers, or transact some other business for the interest of the corporation (*d*). And in order to avoid seeming to overturn former decisions, the distinction has been made between *old* and *new* corporations, in the former of which such a bye-law had been held good (*e*).

UNDER a general power to make bye-laws, a corporation cannot make a bye-law imposing an oath on a member on his admission (*f*).

AN *ex post facto* bye-law seems void: as, a bye-law, "that a particular person shall pay 10s. per month for *having* set up shop, without licence from the mayor, aldermen, and common council," without a previous general

(*a*) Vid. vol. 1, 386, 389.

(*b*) 2 Show. 159.

(*c*) Lutw. 1324.

(*d*) Ld. Raym. 114.

(*e*) Id. ibid. et vid. Wallis's case. Cro. Jac. 555, cited Lutw. 1320.

(*f*) Str. 537, 539, vid. vol. 1, 363.

bye law to the same purpose, even on the supposition, that such a previous bye law would have been good (*a*).

A BYE LAW may *regulate* or *modify* the constitution of a corporation, but cannot *alter* it.

How far a bye law may interfere in matters of *election* to the *offices* of a corporation, has been considered in a former section (*b*). To the examples there given, we shall add the following one.

A CHARTER gave the power of making bye laws to the mayor, jurats, and forty common councilmen, a body constituted by the charter as distinct from the commonalty, and vested the election of common councilmen in the mayor, jurats, and commonalty at large.—The mayor, jurats, and common council made a bye law, “*confining the election to the mayor, jurats, and such of the commonalty as were or should be of the common council for the time being, and sixty others of the said commonalty who were or should be the senior common freemen for the time being, as they should stand in order of seniority on the books of admission of freemen; such sixty not being mayor, jurats, or of the common council.*”

THE court held this bye law to be manifestly contrary to the intention of the charter—the latter gave the right to the whole body of the commonalty; but this bye law had been made by a part of the corporation to deprive the rest of their right to elect, without their consent (*c*).

THE same rule obtains with respect to *other* parts of the constitution established by the charter.

PREVIOUS to the 15th of Charles the second, the common council of the town of Northampton, which was a

(*a*) 1 Keb. 733.

(*b*) S. 8, ante, p. 20—30.

(*c*) Rex v. Cutbush, common councilman of Maidstone. 4 Bur. 2204, 2208.

corporation by prescription, consisted of the mayor and bailiffs for the time being, such other burgessees as had been mayors or bailiffs, and "forty-eight burgessees," called the Company of Forty-eight.—The right to the freedom of the town was by birth or servitude, or by the *election* of the common council so composed, or the major part of them in common council assembled.

CHARLES the second, in the fifteenth year of his reign, granted the town a charter, confirming the former constitution, and giving the power of making bye laws to the common council.—They made a bye law, "that any person not intitled to the freedom of the town by birth or servitude, should be admitted to it on payment of 10l. with the usual and accustomed fees."

THE court were clearly of opinion that this bye law was an alteration of the constitution given by the crown, and therefore void (a).

By a charter of Queen Elizabeth, the common council of Helston, in Cornwall, consisted of the mayor and four aldermen, who likewise had the power of making bye laws.—The mayor, aldermen, and *commonalty*, who consisted of an indefinite number, had the right of electing such of the inhabitants as they thought fit, to be burgessees and freemen.—The mayor and aldermen, *with the assent of the commonalty*, made a bye law, "that the mayor and aldermen alone should, without the concurrence of the commonalty, for the future, exercise that right."

GREAT stress was laid on the circumstance, that this bye law was made with the assent of the commonalty; but Lord Mansfield said, that was of no importance, because, as the power of making bye laws was given to the common council, the body at large could not interfere;

(a) Rex v. Breton, &c. 4 Bur. 2260, 2267.

and the common council could not take from the body at large a right which the charter had vested in them (a).

By the custom of the city of London, a man to be intitled to the freedom of the city must first be free of *some* company; but it is not, by the custom, necessary that he should be free of that particular company of which he exercises the trade.—A bye law, “that a man who exercises a trade within the city, of which there is no incorporate company, shall take the freedom of a company of a trade that has an affinity to that which he exercises,” has been held void. But a bye law “which orders a man, who practises a trade of which there is an incorporate company, to take his freedom in that particular company,” has been held good.

THERE is a company of musicians, but no company of dancing masters.—A bye law, after reciting that many foreigners, not being free of the city, nor members of any fraternity, took upon them the art of dancing, enacted, “that every person using the occupation of *music* and *dancing* within the city, who should have a privilege to be made free by patrimony, should, at the next court of assistants of the company of musicians, after notice, accept and take upon himself the freedom of the said company; and that every person who had served an apprenticeship to the mystery of music and dancing, and not being made free, should yet exercise his trade, should forfeit 10*l.* for every offence.”

AN action being brought in the mayor’s court to recover the penalty on a breach of this bye law, and removed into the court of King’s Bench; the court said, that though the custom was, that whoever was free of the city must be free of *some* company; yet that custom did not oblige

(a) *Rex v. Head.* 4 Bur. 2515, 2521.

a man to be of any *particular* company ; for that if it should, then, though the defendant might be intitled by birth to be free of one company, yet he must also be free of another, which was unreasonable.—It might be a question, whether the city had a power to compel men of no trades to be free of those companies which were suitable to their professions ; dancing was no trade, but it might be called a profession : it was true, music was suitable to it ; but it was not necessary that a dancing master should be free of the musicians' company : there was no fellowship of refiners ; but the court of aldermen could not order them to be free of the goldsmiths' company, which was the most suitable to them.

THIS bye law, they added, was in the nature of a monopoly to the company of musicians, *who could not be compelled to make the defendant free of that company if they refused (a).*

IF this last observation, however, had any material influence on the decision of the case, the latter is not to be considered as an authority, because, as will be seen from the *next* case, the company in which the bye law directs the party to take his freedom, may be compelled by mandamus to admit him. But, it is apprehended, that the best reason for this decision is, that all companies being established for the regulation and superintendence of their own particular trades, it can answer no purpose of that kind to compel a man who practises a trade of which there is no company, to take his freedom in any one company rather than in another.

A BYE LAW of the city of London, after reciting, “ that several persons not free of the joiners' company had exercised the trade of a joiner in an unskilful and frau-

(a) Robinson v. Gros court, 5 Mod. 104.

dulent manner, which could not be redressed while such persons were not under the orders and regulations of the company," enacted, "that no person should use that trade within the city, without being free of the company, under the penalty of 10l."

ONE George Wannel, who had served an apprenticeship to a merchant taylor, and had been admitted to the freedom of the merchant taylors' company, exercised the trade of a joiner, without being free of that company; for which reason, on his application to the chamberlain to be admitted to the freedom of the city, the chamberlain refused: Wannel then obtained a mandamus, to which the chamberlain returned the bye law, and the fact of Wannel's exercising the trade of a joiner, without being free of that company: the court thought that this was a reasonable bye law, as it tended to prevent fraud and unskilfulness in a trade, of which none but a company who exercised the *same* trade could be judges: that it did not take away the party's right to his freedom, but only his election of what company he should be free; and directed him to go to the *proper* company.—But the Chief Justice started a question, whether the prosecutor, having served his apprenticeship to a merchant taylor, could compel the joiners' company to admit him, which unless he could do the bye law would be void: to which Mr. Justice Fortescue answered, that the imposition of the penalty of 10l. for not taking up his freedom in that company, was a strong implication that they were bound to grant it, and the case being again argued, the court expressed their unanimous opinion, that they might be compelled by mandamus to admit, in order to prevent the forfeiture of the penalty (a).

(a) Wannel v. chamberlain of London. Str. 675. 8 Mod. 267.

A BYE LAW of the mayor, aldermen, and common council of the city of London, after reciting, "that many persons, who exercised the trade of butchers, had obtained freedoms of *other* companies, by redemption or otherwise, by which means the company of butchers was much diminished and fallen into decay;" to remedy this inconvenience, ordained, "that every person, not being already free of the city, occupying, using, or exercising, or who should occupy, use, or exercise the art, trade, or mystery of a butcher, within the city or its liberties, should take upon himself the freedom of the company of butchers, and that no person then using, or who should thereafter use or exercise the trade of a butcher within the said city or liberties, should be admitted to the freedom of the said city, by the chamberlain thereof, of or in any *other* company than the said company of butchers; provided, that every person, not being already free of the city, but intitled to the freedom of any other company, by patrimony or service, should be admitted into this company of butchers, on payment of like fine or fees, as were usually paid on admission of a child or apprentice."—Then it imposed a fine of 5*l*. on any person, not free of this company, who should use the trade of a butcher.

AN action having been brought in the mayor's court, against one Godman, to recover the penalty for a breach of this bye law, he brought a habeas corpus cum causâ, directed to the mayor, aldermen, and sheriffs, commanding them to bring up the body of the defendant, together with the cause.

THE return stated the general custom of London, by which the mayor and aldermen, with consent of the commonalty in common council assembled, had power to provide

vide a remedy, if any ancient custom, hard and defective in any thing newly arising, wanted amendment; then the preceding bye law and the breach of it by the defendant. The principal objection taken to this return was, that the bye law was in *restraint* of trade; that no custom enabling the court of common council to make a bye law in *restraint* of trade was set forth in the return; and that the general custom to make bye laws was not sufficient to support such a bye law as this.

LORD Mansfield said, "he supposed it was a slip in the return; that he did not take the objection to be, that it was necessary there should be a *particular* custom to make a *particular* bye law;" but, "that there was *no general* power shewn, under the custom, to lay such a restraint on trade."

THIS bye law, he said, was a *restraint* of trade, and not a mere *regulation* of it; the preamble did not pretend it to be made to *regulate* the trade, but merely for the benefit of the butchers' company. It was founded on the *general* power of making bye laws in the city of London.—But under this *general* power, it was certain a bye law could not be made to restrain trade: and, by the general custom of London, every freeman might exercise any trade *without* being of a *particular* company, which this bye law required him to be.—On Wannel's case, he observed, that there was not a full state of the pleadings given in the report; but that it appeared the return stated, that no person could be a freeman of the city till he was a member of one of the fraternities; that it then stated a power to make bye laws; but *how* that power was set out, did not appear.—And as this power to make bye laws to *restrain* trade was not set out in the present case, the court could not pre-

sume it, from any printed book, or in any other way whatever (a).

A FEW years afterwards, the same bye law came in question on the return to a mandamus, directed to the chamberlain of London, commanding him to admit William Cope to the freedom of the city; he having served an apprenticeship to John Cope, a freeman of the company of clothworkers, and afterwards been duly admitted to the freedom of that company.

THE return set forth, that there were several guilds, companies, and fraternities within the city, which had used, and ought to have the superintendence, correction, and government of the several persons using and exercising the several arts, trades, mysteries, and manual occupations belonging to such several guilds, companies, and fraternities, in the use and exercise of such arts, trades, mysteries, and manual occupations within the city and liberties; and that these guilds, &c. and the men of the same, were under the order, government, and regulation of the mayor and aldermen for the time being, with the commonalty of the city in common council assembled.—It then stated the custom, which requires every person, at the time of his admission to the freedom of the city, to be free of some one of the companies; and in a subsequent part, the general custom by which the mayor and aldermen, with the consent of the common council, had been accustomed to provide a remedy, where any custom which had obtained in the city was inconvenient or defective, or where any thing newly arising, for which no remedy had already been ordained, wanted amendment.—It then stated that the company of butchers was one of the companies before men-

(a) *Harrison v. Godman*. 1 Bur. 12, 16. Mich. 30 G 2.

tioned;

tioned; and then the bye law in question, with the same preamble as in the former case.—The return then stated, that the prosecutor had been educated as an apprentice in the trade of a butcher, and at the time of his application to be admitted to the freedom of the city, exercised that trade, but that he had not taken his freedom in that company; and assigned this as the reason why the chamberlain refused to admit him.

THE *principal* objection taken to the bye law in the *present* case, was that it essentially varied the constitution of the city, by confining a man to take his freedom in a *particular* company, whereas before he might have taken it in *any* company he pleased.—It was likewise contended, as in the former case, that it restrained trade; and that the return did not set forth a custom sufficient to justify such a restraint: but it was granted, that if the case of Wannel was to be considered as an authority in point, the bye law could not be impeached.

THE court were unanimously of opinion, that Wannel's case was an express authority, and that the bye law in question did not alter the constitution of the corporation, but restored it to what it must originally have been; and that it *regulated* trade and did not *restrain* it (*a*).

It is remarkable, that no notice was taken, either by the counsel or the court, of the former case on this bye law; and it seems almost impossible to reconcile the two decisions: in the first case, the bye law was held bad, on the ground that it was in *restraint* of trade, and not supported by any custom; and the case of Wannel, which was cited as an authority in favour of it, was supposed to have contained the allegation of a custom which did not appear in the printed report:—in the second case, the court consider

(*a*) Rex v. Harrison. 3 Bur. 1322. Trin. 2 G. 3.

the bye law as made in *regulation* of trade, and therefore not *requiring* a custom to support it; and they admit the case of Wannel, as stated in the printed report, to be a direct authority, without having recourse to any circumstance not appearing there. The return of the chamberlain, in the second case, is, indeed, more full than that of the mayor and aldermen in the first; but no custom appears in the former any more than in the latter to justify a bye law in *restraint* of trade; and had the court now considered the bye law on its own merits, in the same light in which they considered it on the former occasion, they must necessarily have given the same judgment.

I APPREHEND, that the bye-law in question has no relation to trade, either as a regulation, or as a restraint; but that it relates solely to the constitution of the corporation; that it is not an *alteration* of that constitution, but a *regulation* of it; and that, therefore, the last decision is right.

A BYE LAW may regulate, in a reasonable manner, the exercise of a right, or the internal affairs of a corporation, or the conduct of its members, or the mode by which a person is to be admitted to the exercise of a right to which he has an inchoate title; but it cannot take away a right, or impose any unreasonable restraint on the exercise of it.

A BYE LAW, "that no tenant of a manor shall put his sheep upon the common before a certain day;" or "that no one shall put his sheep in a *particular part* of the common," has been held good, on the ground, that it is only a reasonable regulation (*a*). But a bye law, in general terms, "that no one shall put sheep on the common," or "that no one shall put his beasts, called steers, upon the common, if they be more than a year old," has been held bad, because it entirely takes away a right (*b*).

(*a*) 1 Rol. Abr. 365, 366. Cro. Car. 497.

(*b*) 1 Andersf. 234. 1 Leon. 190. 3 Leon. 265. Dalif. 95, 103.

By the custom of the city of London, every freeman following the profession of a surgeon, within the city, had a right to take apprentices of the age of fourteen years, or upwards, for the space of seven years; and such apprentices were accustomed to be admitted and bound, in the presence or with the consent of the master and wardens of the company of surgeons, or some of them.

THE company made a bye-law, "That *no member* of the company should take into his service any person, as his apprentice, to be instructed in the art or science of surgery, for any shorter time than seven years; which person should understand the Latin tongue, his ability in which should, before he should be bound, be tried by the governors, or one of them; and that every freeman of the company, or foreign brother, should, within one month next after his entertainment of any person, in order to being his apprentice, present such person before the governors, or two of them, at a court to be by them held; and there bind such person to him before the said governors, by indenture, on pain of forfeiting 20*l.* and that the clerk of the company should not bind any person who had not been so presented and examined, on pain of forfeiting 20*l.* and being liable to be removed from his office; and that no apprentice should be turned over from one master to another, but at a court, in the presence of the master and wardens, or one of them."

THE court held this bye law to be so manifestly good, that there was no occasion to hear an argument in its favour (a).

By a bye law of the city of Durham, made for the purpose of preventing persons from being made free, who had

(a) Rex. v. the master, &c. of the company of surgeons, London.
2 Bur. 892, 897.

not a title or right to the freedom of the city and borough of Framwelgate, which is under the same government as the city, it was ordained, "That the mayor, one or more alderman or aldermen of the city, and the wardens and stewards of the several respective companies for the time being, should, from thenceforth, meet at the guildhall at four stated times in every year; and that every person, who should thereafter be a candidate for admission to the freedom of the city and borough, should be then and there *called*, at three of the said several meetings, *before* such his admittance to be a freeman, and should be approved by the mayor, and one or more alderman or aldermen, and the wardens and stewards of the company or fraternity, of which he was to be admitted a freeman, or by the majority of such persons composing the meeting."

AT the same time another bye law was made, imposing a penalty of 30*l.* on any warden, steward, or other freeman, who should confer the freedom of the city, or of any company therein, contrary to the first bye law: and a third, imposing a like penalty on any mayor who should swear any person who had not actually served seven years as an apprentice with a freeman of any of the said companies, or who should not be justly intitled to his freedom by ancient usage and custom.

THESE bye laws were held to be good, on the principle, that they were not against any law of the land; that they did not impose any restraint on trade, but introduced a reasonable regulation, well calculated to prevent persons from being unduly made free, who were not intitled by birthright, service, or purchase, by providing a method for previously examining into the rights of the candidates (a).

(a) Green v. mayor of Durham, 1 Bur. 127, 133.

A BYE LAW, that a common councilman, where the place of common councilman is for life, shall not voluntarily resign, has been held good (a).

OF all the bye laws, which have been the subject of discussion in the courts of Westminster Hall, those which affect trade make the most conspicuous figure, and such a jealousy of every thing that seems to have the least tendency to infringe on the freedom of it, prevails on all occasions, that objections are frequently taken to bye laws, as tending to *restrain* trade, which have not the least relation to it.

AT common law, any man might exercise any trade or profession he pleased, without limitation or controul: and there are a number of statutes in the early part of our history, made in protection of that general liberty.

By the 30th chapter of Magna Charta, "free liberty of coming in, going out, and continuing in England, and of buying and selling without any manner of evil tolts, according to the old and rightful customs, except in time of war," is given to all merchants, except to those that were formerly prohibited: and if the country, from which they come, be at war with this country, they are to be attached, without harm to their body or goods, till it be known how the merchants of this country are treated in theirs, on which their treatment here is to depend.

By 9 Ed. 3, c. 1, it is enacted, that all merchants, strangers, or denizens, shall have full liberty to buy and sell the several articles there enumerated, and, in general, every thing vendible, to persons of every description, without hindrance from any person whatever, in any city, borough, town, sea-port, fair, market, or elsewhere, within franchise or without, except enemies to the King or realm.

(a) Lutw. 404, 5.

AND, if within any franchise, any one shall complain to the mayor or other officer, having rule within such franchise, and such mayor or other officer shall refuse remedy, and be thereof attainted, the franchise shall be forfeited; and the officer and the disturber shall be bound to restore double damages to the party grieved:—if such disturbance be in a place where there is no franchise, then the lord, or his bailiff or constable being present shall do right, or being attainted of refusal, shall forfeit double damages to the party plaintiff:—and, in both cases, the disturbers shall have one year's imprisonment, and, nevertheless, be ransomed at the King's will.

It is declared, by the same statute, that these provisions shall hold good, notwithstanding charters of franchise granted to any city, borough, town, port of the sea, or other places within the realm, and notwithstanding usage or custom, or any judgment given on such charters, usages, or customs, which are all declared to be of no effect, so far as they are in opposition to this statute.

By 14 Ed. 3, c. 2, in confirmation of the great charter, the King, at the request of the prelates, earls, barons, and commons, grants for himself, his heirs and successors, that all merchants denizens and foreigners, except enemies, might, without let, safely come into England with their goods and merchandizes, and safely tarry and safely return, paying the customs, subsidies, and other profits reasonably due; so always, that franchises and free customs reasonably granted, by the King and his ancestors, to the city of London, and other cities, boroughs, and towns, should be to them saved.

By 25 Ed. 3, ft. 4, c. 2, that of the 9 Ed. 3, is repeated and enforced, and it is provided in terms more particularly guarded, that every merchant or other, as well alien as denizen,

nizen, of what condition soever he be, who shall bring wine, &c to the city of London, or other cities, boroughs, towns, or sea ports, may freely, and without challenge or impeachment of any, sell in *gross* or *retail*, or by parcels at his will, to all manner of people that will buy the same, notwithstanding any franchises, grants, or customs used, or other thing done to the contrary.—And the reason given for this ordinance, by the legislature, is, that such usages and franchises are contrary to the common good of the King and his people.

By 37 Ed. 3, c. 5, complaint is made of the mischiefs which had arisen from merchants purchasing various kinds of goods, while the market was full, and afterwards selling at high prices; to remedy which, it is enacted, that no merchant shall deal in more than one commodity.—By c. 6. the same restraint is imposed on handicraft trades: but the very next year, that part which relates to merchants is repealed (*a*), and full liberty given them to deal in what merchandize they please.

THE statute of 2 R. 2, c. 1, after reciting the 9 Ed. 3, and 25 Ed. 3, before mentioned, and complaining, that, notwithstanding these statutes, merchants strangers and others, were grievously oppressed by the citizens and burgesses of different cities and boroughs, gives free liberty to merchants aliens and denizens, to buy and sell in gross and by retail, as well in the city of London, as in all cities, boroughs, ports of the sea, fairs, markets and other places within the realm, certain articles enumerated (*b*), and other such small wares:—but it orders, “that all manner of

(*a*) 38 Ed. 3, c. 2.

(*b*) Corn, flesh, fish, and all manner of other victuals, and also all manner of spices, fruit, fur, and all manner of small wares, as silk, gold wire, or silver wire, coverchiefs, and other such small ware.

wines,

wines, as well sweet as other, shall be sold by such strangers only in gross, and not by retail, in cities, boroughs, and other towns franchised ;” and confines the liberty of selling them by retail to the inhabitants and freemen.

WITH respect to such articles as the statute describes, under the denomination of great wares (*a*), it gives full liberty to every person, as well alien as denizen, to sell them in gross, as well in the city of London, as in other cities, boroughs, ports of the sea, towns, fairs, markets, and elsewhere through the realm, within franchise and without ; but confines the liberty of selling them by retail to the inhabitants and freemen :—merchants strangers or denizens, however, are permitted to buy and sell their wools, woolfells, wares, cloths, iron and other merchandizes, *at fairs and markets in the country*, in gross or by retail, as they might have done before.

THE statute 11 R. 2, c. 7, recites at full length the 9 and 25 Ed. 3, confirms them in every particular, and in general terms declares void, and repeals all statutes, in any respect contrary to these two.

THE statute 16 R. 2, c. 1, recites the 9 and 25 Ed. 3, and 11 R. 2, and then premising, “ that these statutes, if they should be fully holden and executed, would extend to the great hindrance and damage, as well of the city of London, as of other cities, boroughs, and towns, within the realm,” ordains “ that no merchant stranger alien shall sell or buy, or merchandise within the realm with another stranger merchant alien, to sell again, and that no stranger merchant alien shall sell to retail within the realm, nor shall put to sale any manner of wares or merchandises, except

(*a*) Cloth of gold and silver, silk, sendal, napery, linen cloth, canvas, and other such great wares, and also all manner of other great merchandises, not above expressed, whatsoever they be.

livings

livings and *vituals*, and also, that aliens shall sell wines by *whole* vessels, and spicery by whole vessels and bales, and in no other manner; and that no manner of spicery, after it shall be brought into the realm, shall be carried out of it by alien or denizen, on pain of forfeiture of the same." But this part, prohibiting the exportation of spicery once brought into the realm on pain of forfeiture, is repealed by ft. 3 C. 1, c. 4, s. 27.

By 3 H. 7, c. 9, a bye law of the city of London, "that no freeman shall sell his wares at a fair or market *out* of the city," was annulled: and by 12 H. 7, c. 6, a bye law of the merchant adventurers of London, "that none should sell or buy in the dominions of the Duke of Burgundy," was also annulled (*a*).

WITH respect to handicraft trades, every man, previous to the 37 Ed. 3, c. 6, might have exercised *whatever* trade he pleased, and as *many* trades as he pleased, in *any* part of the kingdom, except in those corporate towns where there was an immemorial *custom* imposing some particular restraint (*b*): and, though by that statute a man was confined to

(*a*) Vid. 1 Rol. Abr. 363.

(*b*) The only judicial opinion we find against this general freedom of trade at common law, is that of Dodridge, J. and Sir James Ley, C. J. of whom the former said, he was not of opinion that all trades might be equally used, by any body, at common law, and that any one might use what and as many trades as he pleased; for that God, at the original creation of man, had ordained one man to one trade and another to another; that, accordingly, nature had disposed men to one trade more than to another; and that no civil republic could subsist without distinction of trades: the chief justice said, that, though at common law, a man was not bound to use one trade more than another, yet there was a distinction of trades, and a man could not use two; and of this he mentioned a notable record in the time of H. 4, when Gascoigne was chief justice of the King's Bench: a vintner, who had used to sell wine, and also to

to the exercise of one *particular* trade, yet, till the 5 El. c. 4, he might, without any preliminary service in the nature of an apprenticeship, have practised any trade in any part of the kingdom, under the same exception.—The judges, on many occasions, observe, that unskilfulness in the trade which he pretends to practise, is a sufficient punishment to the tradesman, because upon his skill depends the extent of his employment (*a*); and where any man, who employs the tradesman, receives any damage from the unskilful manner in which the work is executed, the common law has provided a remedy by action (*b*).

By 5 El. c. 4, s. 31, it was enacted, “that after the first day of May, then next coming, it should not be lawful to any person or persons, other than such as then lawfully used or exercised any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation, *then* used or occupied, within the realm of England or Wales; except he should have been *brought up* therein seven years, at least, as an apprentice, in conformity to the provisions of former sections of the statute; nor to set any person to work in such mystery, art, or occupation, being not a workman at *that* day, except he should have been apprentice as aforesaid; or else, having served as an apprentice as aforesaid, he should or would become a journeyman, or be hired by the year; on pain

give suppers and dinners, and sell victuals, was indicted, convicted, and fined: He consulted with other vintners, and told them, that if they would give 5*l.* to Gascoigne all would be well; and he collected 5*l.* among them to give to Gascoigne, who having intelligence of it, caused him to be indicted of that also, and he was fined. 2 Rol. Rep. 392.

(*a*) Vid. 2 Bulst. 191.

(*b*) Vid. 1 Saund. 312.

that

that every person doing the contrary should forfeit for every default, forty shillings for every month."

By s. 40, it was provided, "that nothing in this act should be prejudicial or hurtful to the cities of London and Norwich, or to the lawful liberties, usages, customs, or privileges of the same cities, for or concerning the having or taking of any apprentice or apprentices; but that the citizens and freemen of the same cities should and might take, have and retain apprentices there, in such manner and form as they might lawfully have done before the making of this statute."

As *previous* to this statute, a man might have exercised any trade he pleased, in any part of the kingdom where there was no *custom* of exclusion, so, *since* the statute, a man who has any where served an apprenticeship to any trade, may exercise that trade in any corporate town where there is no exclusive custom, without being free of that town; and a bye law to the contrary is void (a).

OF bye laws which affect trade, a distinction runs through all the books between those which impose a restraint on it, and those which introduce a reasonable regulation of it; those which are decided to be of the first kind, are uniformly held to be void, and those of the latter to be good; but it is not always easy to agree with the courts in their decisions, as to what shall be considered a restraint, and what only a reasonable regulation of trade.

OF those bye laws which are in restraint of trade, some affect the conduct of the members of the corporation, and others the general liberty of the subject.—Those of both kinds are void.

THE corporation of merchant taylors made a bye law, "that every merchant taylor, member of the company,

(a) 11 Co. 54 a, Lutw. 564.

who should not put out one-half of all such cloths as he should put forth to be rowed, shorn, and dressed, to *some brother* of the company, should forfeit to the use of the poor of the company, for every cloth put forth to be dressed contrary to the meaning of this bye law, the sum of 10s. to be levied by the master and wardens, by distress or otherwise, without favour or excuse" (a). This bye law was held void, on account of the many pernicious effects it tended to introduce: if the company had a power, by a bye law, to order the *half* of the cloths to be given to the brothers of the company to be dressed, so they might order the whole; which would reduce the subjects to this extremity, that on the one hand, those of the company who had cloths to dress, could have none dressed but at the pleasure of the *clothworkers* of the company, at their own time and at their own price; and on the other hand, that other clothworkers, not of the company, could have hardly any work at all, and would, of consequence, become a burthen to the public: that enhancing the price was a pernicious consequence of such a bye law of the first magnitude; for that he who has the sole privilege of vending or manufacturing any particular commodity, may, by raising the price, produce a scarcity whenever he pleased; it also prevented the work from being so well executed, as it prevented competition (b).

THE company of silk throwsters made a bye law, "that no man who was not an assistant of the company should keep more than one hundred and sixty spindles, and that an assistant should not keep more than two hundred and forty."—This bye law seems open to the same kind of objections as the last; and accordingly it was objected,

(a) Moore, 577. 1 Rol. Abr. 364.

(b) Moore, 580, 587.

that it was in restraint of trade, the spindles being the substantial implements of work; that it was as oppressive as a law would be which should restrain a man from selling beyond a certain quantity of cloth within the year: it was answered, that convenience was a matter of fact which depended on evidence; that this was rather a proper *distribution* of trade, than a restraint of it; for that by such a regulation every man would have some employment, and nothing was restrained but the monopoly; that it was as reasonable a regulation as the limitation of the number of apprentices, which had been held good.—And the court is reported to have observed, but with what reason is not very clear, “that *manufactures* differed from *other* trades, for that here *all* must have something to do, otherwise they would be left to starve” (a).

THE common council of London made a bye law for the regulation, as it was pretended, of the companies of bricklayers and plaisterers, the purport of which was, “that the bricklayers should not plaister a partition wall of brick, on a chimney piece, with lime and hair, but that with lime and sand they might, on the ground that plaistering with lime and hair belonged only to the plaisterers.” It was contended, on behalf of the bricklayers and tylers, that this bye law was void, because it belonged to their trade, as well as to that of the plaisterers, to plaister with lime and hair: in answer to this, it was said, that it did not appear, by any thing before the court, to which of the two trades this belonged; that therefore, it was to be presumed, there had been a dispute between the two companies, which the common council, who had a right to determine, had decided; and that, therefore, the court was bound by their determination; and that the bye law

(a) 2 Keb. 310. 1 Lev. 229, cited Com. Dig. Bye Law, b. 3.

was not in restraint, but in regulation of trade. Several instances of similar bye laws having been held good, were also cited: "that cobblers should not mount boots nor make goloshoes, which belonged to shoemakers;" "that archers should not make bows, nor bowyers make arrows;" and, "that brown bakers should not bake white bread, nor white bakers, brown" (a).

A BYE LAW of a city or town, "that no freeman should take the son of a stranger as an apprentice, or employ as a journeyman any man not free," has been held void, as tending to raise a monopoly, and confine the trade to such as have been born or educated in a particular place, which is a conspiracy against the general interests of the country (b).

A BYE LAW of a borough, "that no person inhabiting *out* of the borough, or not free of it, shall expose goods to sale in any market within the borough, except victuals on market days," is void for a similar reason (c).

THE taylor and clothworkers of Ipswich were incorporated by King James the first, with express power to make reasonable bye laws, according to their discretion, for the good rule and government of the company: they made a bye law, "that no person exercising any of these trades, within the town of Ipswich, should keep any shop or chamber, or *exercise the said faculties*, or either of them, or take an apprentice or journeyman, till he had presented himself to the master and wardens of the said society, for the time being, or some three of them, and should prove that he had served seven years at the least as an apprentice, and before he should be admitted by them to be a sufficient

(a) 2 Rol. Rep. 391, 2, cited Com. Dig. Bye Law, b. 3.

(b) Vid. Moore, 411, n. 562. Carter, 118.

(c) Parry v. Berry, Com. Rep. 269.

workman."

workman.”—It was held, “that this being a restraint beyond what the statute of Elizabeth imposed, was against law, and that, therefore, as the statute had not restrained him who had served as an apprentice for seven years from exercising the trade of a taylor, the bye law could not prohibit him from exercising his trade, till he had presented himself before the company, or till they allowed him to be a workman, for that these were against the liberty and freedom of the subject, and enabled the old and rich of the same trade to oppress the young tradesmen, by delay or the extortion of money” (a).

QUEEN Elizabeth made a corporation, by the name of Guardians and Fellowship of the Weavers of Newbury, and gave them power to make laws consonant to reason, and not contrary to the laws and statutes of the kingdom, and by the same letters patents, ordained for herself, her heirs and successors, that none should exercise the trade of weaving within the town, unless he were first admitted thereto by the guardians and fellowship of weavers; they afterwards made a bye law, “that no person should use the art of weaving within the said town, unless he had been an apprentice to the art *within* the town, and had used it there by the space of five years before the making of the bye law, or were admitted by the guardians and fellowship, on the pain of 20s. per month;” an action of debt having been brought for the recovery of a penalty under this bye law, judgment was given against the plaintiffs for gross faults, as Hobart tells us, in the declaration: but he adds, that the worst fault was in the law itself, because it had a tendency to exclude even apprentices brought up within the town itself, after the making of the law.—And the question principally intended to be agitated in this case was,

(a) Case of the taylor of Ipswich, 11 Co. 53, 54.

"whether a new corporation, having no power by prescription to exclude others, can make a law to exclude all persons from using an art or trade within their town, to which they were not apprentices within the *same* town, though they may have served an apprenticeship to it elsewhere." Hobart observes, that the question is between the particular privileges of towns and the general liberties of the people, a question which well merited a determination, as it concerned the trading interests of the whole realm. This point, however, not being necessary for the determination of the case before the court, was not agitated on the bench.—But Hobart gives his own opinion clearly against the exclusive privilege, and Rolle cites this opinion as law (a).

THE inhabitants of Milton and Gravesend prescribed to have the passage by water from thence to London, and to make bye laws for the regulation of that passage.—They were incorporated in the tenth year of Elizabeth, by the name, of Portreve, Jurats, and Inhabitants of Milton and Gravesend, with power to the portreve, jurats, and twelve of the inhabitants to make bye laws for the regulation of the ferry; they had been accustomed to provide watermen, steersmen, and rowers, and a barge, and used to take of every person, for himself and fardel, 2d. and when the fare at this rate amounted to 4s. were accustomed to sail.—Many watermen, however, had so far infringed this privilege as to ply and take in poor passengers before the barge was furnished with the proper number; the consequence of which was, that the barge was often obliged to wait longer to have its number completed than otherwise it would have done, and those who went in it were delayed of their pas-

(a) Norris v. Staps. Hob. 210. Brownl. and Goulds. 48, 49. 1 Rol. Rep. 4, 5, cited 3 Salk. 76. 1 Rol. Abr. 364.

sage; to remedy this inconvenience, and to assert the privilege of the barge, the portreve, jurats, and twelve of the inhabitants, made a bye law, "that if the owner of the tilt boat, or any other waterman, should receive any passenger who should be willing to go with the barge, before the latter should have completed its number, he should pay to the portreve, &c. 2d. for every passenger so taken."

To this bye law it was objected, that it abridged the liberty of other watermen not employed in the barge, and their power of earning their bread; and that the passenger who might wish to procure a speedier conveyance was also injured, for that, by waiting till the number in the barge was complete, he might lose the tide, unless to save it he would pay an extraordinary price: and for these reasons the law was held to be void (*a*).

IN many corporations there are many customs which have the force of law, and on which bye laws are sometimes founded, and supported as good, which without such foundation would be void; and on this principle depend some distinctions mentioned in the books, with respect to the force and validity of some particular bye laws, which are good in London, but void in other places.—London is the most ancient corporation in the kingdom, and, having from the remotest times been considered of great importance, a greater number of customs have imperceptibly crept in, and from long acquiescence been considered as obligatory there, than in any other corporation in the kingdom:—many of these customs are against the general freedom of trade allowed by the common law; but because they have prevailed from time immemorial, a bye law

(*a*) Brownl. and Goulds. pt. 2, 177, et vid. Str. 466, 9.

founded

founded on any of them is held to be good, which in any other corporation, not having a similar custom, would be void: but if any other corporation have a similar custom, on which a bye law may be founded, the latter will be equally binding in such a corporation as in London; for the intrinsic power of making bye laws is the same, and of the same extent in all corporations constituted for purposes of the same kind. — Thus the custom of *foreign bought and foreign sold*, “by which a man not free of a city or town is restrained from buying or selling goods to other foreigners within the city or town, under the penalty of forfeiture of the goods,” has been held good in the city of York and the city of Lincoln (a), though a bye law to the same effect would be void (b).

THE true distinction, therefore, seems to be this, that when there is an antecedent custom in London, on which a bye law there is founded, and which is not in another place, then a bye law will be good in London, which, in another place, will *not* be good: but when bye laws in London are founded only on their general power by custom to make bye laws, and are not explanatory of a particular custom, or auxiliary to one on which they are founded; then such bye laws can bind the subjects there in no other manner, nor in any higher degree than the same bye laws would bind them in any other corporation (c).

IT is on this principle that we are to explain the seeming inconsistency between the case of the taylor of Ipswich and that of the weavers of Newbury, and others of a similar kind on the one hand, and that of Wagoner and others of the same description on the other. — The case of Wagoner was thus: —

(a) Dyer, 279, pl. 10. 2 Rol. Abr. 202.

(b) Vid. ante, p. 110.

(c) Skinner, 378, *arguendo*.

AN habeas corpus was directed to the mayor, aldermen, and sheriffs of London, commanding them to bring up the body of Wagoner, who had been arrested in London, and remained in their custody, with the cause of his arrest and detainer.

THEY returned the general custom, by which the common council used to make laws for the remedy of defects of ancient customs, and of the inconveniencies proceeding from things newly arising within the city: then, that by virtue of this power, they had made a bye law, by which, after reciting by way of preamble, "that, by the ancient charters, *customs*, franchises, and liberties of the city of London, confirmed by sundry acts of parliament, no person, not being free of the city of London, might or ought to sell or put to sale any wares or merchandizes within the said city, or the liberties of the same, by retail, or keep any open or inward shop, or other inward place or room for shew, sale, or putting to sale of any wares or merchandizes, or for use of any art, occupation, mystery, or handicraft within the same:" then reciting the confirmation of their customs by Edward the third, and several bye laws which they had made at several different times, for enforcing the observance of this particular custom, and "that," notwithstanding these, "several strangers to the liberty of the city, not regarding the said ancient charters, franchises, customs, or liberties of the said city, and acts and ordinances theretofore made according to the same, but wholly intending their private profit, had of late years devised and practised, by all sinister and subtle means, how to defraud the said charters, liberties, customs, good orders, and ordinances, and to that end, did inwardly, in private and secret places, usually and ordinarily shew, sell, and put to sale their wares and merchandizes, and use arts, trades, occupations,

occupations, mysteries, and handicrafts within the said city and liberties of the same, to the great detriment and hurt of the freemen of the said city, who paid lot and scot, bore offices, and underwent other charges, which strangers and others not free were not chargeable withal, nor would perform ;” it was enacted, “ that no person whatever, not being free of the city of London, should, at any time thereafter, either directly or indirectly, by himself, or by any other, shew, sell, or put to sale, any wares or merchandizes by retail, within the said city, or the liberties or suburbs of the same, under the penalty of 5l. for every time that such person should shew, sell, or put to sale any wares or merchandizes by retail within the said city, liberties, or suburbs ;” and further, “ that no person whatever, not being free of the city of London, should directly or indirectly, by himself or any other, keep any shop or open place whatever, inward or outward, for shew or putting to sale of any wares or merchandizes whatever by way of retail, or use any art, trade, occupation, mystery, or handicraft whatever, within the city or suburbs, under a like penalty of 5l. for every offence.”

THE return afterwards stated, that James Wagoner, not being a freeman of the city, *used the manual occupation* of a tallow chandler, against the true intent of the bye law ; and assigned this as the cause of his arrest and detention.

THE court resolved, that the custom set forth, on the whole matter disclosed in the return, was good ; and that the bye law founded on it, as alleged in the return, was also good ; and a distinction was made between such a *custom* within a city or borough, and a charter granted to either of them to the same effect ; that the custom was good, but the grant void ; and that therefore no corporation, within
time

time of memory, could have such a privilege, but by act of parliament (a).

"BUT the court took advisement," says Lord Coke, "on one part of the return, by which it was averred, that James Wagoner used the manual occupation of a tallow chandler, and did not shew that he *sold* any candles; for that if he made them for his own use, without selling for gain, he might well do it, as every one may bake or brew for his own use, without selling bread or beer:" but Lord Coke gives his own opinion in these terms: "it seems implied by the said averment, that it is his trade by which he lives, and not merely that he makes candles for his own use; for it is not properly said, that one *uses a manual occupation*, when he makes no more than for himself, as he who brews or bakes for his own use, cannot be properly said to use the manual occupation of a brewer or baker"(b). It appears, however, by the report of the same case in another book, that the objection prevailed, and that Wagoner was discharged (c).

A CUSTOM in London, "that no *stranger* shall intermeddle, in London or Southwark, with the trade of the company of weavers in London, the company being a corporation by prescription," has been held good; but it has also been held, that it is no infringement of this custom, that a stranger should buy silk or linen yarn, or wool, and carry it to the country, and weave it, and then come back to London and sell the cloth (d).

A BYE LAW founded on a custom of this kind, must be confined strictly within the limits of the custom, both with respect to the place of jurisdiction and the object of the law.

(a) Case of the city of London, 8 Co. 121, b. 125, a.

(b) Id. 129, a. (c) 2 Brownl. 284.

(d) Corporation of weavers in London v. Brown. 1 Cro. 803.

THUS,

THUS, where it was stated, "that, within the city of Exeter, there was, from time immemorial, a company of cordwainers, incorporated by the name of Master, Wardens, Assistants, and Commonalty of Cordwainers of the city of Exeter, and that the said master, wardens, and assistants, had used for all the said time to make bye laws for the government and profit of the said company, and to impose reasonable fines on the breakers thereof;" and further, "that the master, wardens, and assistants had ordained, that no person, *burghess* or *foreigner*, not being a brother of the said society, should make, sell, or offer to sale, or procure to be sold within the city of Exeter, or the *county or liberty* thereof, any boots, &c. or *any other wares belonging to the said art*:" this bye law was held to be beyond the custom, because the latter was confined to the city, but the former extended to the county and liberty:—the custom was only, that the master, wardens, and assistants had used to make bye laws for the government and profit of the said society; but the bye law was, that none should *make* any boots, &c. which was more than a regulation for the government and profit of the society, as it restrained a man from making boots or shoes for his own private use.

AGAIN, the bye law extended beyond their own art, for it ordained, that none should do any thing *pertaining* to the art of shoemakers; but there were many things *pertaining* to that art, for every thing *pertained* to it, which of necessity must be used as auxiliary to it, and without which it could not be used; as leather, which must be made by the tanner, lasts by the lastmaker, &c. (a).

THIS last objection, however, seems not to be well founded, as the meaning of the bye law was clearly, that

(a) Bridg. 141.

no man should exercise any part of that business which a shoemaker must necessarily do for himself.

IN the case of the mayor and commonalty of Colchester against Goodwin, which was an action of debt to recover the penalty of a bye law, the plaintiffs set forth two customs, and two bye laws founded on those customs.—The first custom was, “that no stranger artificer, who was not free of the said borough, should use any art, mystery, or occupation within the same;” the second custom was, “that the *bailiff* and commonalty, before the 11th of Charles the first, and, after that time, by a charter from that King, the mayor and commonalty used to make reasonable ordinances and bye laws about tradesmen and artificers, and impose reasonable fines on offenders.”

THE first bye law was, “that no foreigner who should be commorant in the borough of Colchester, or liberties thereof, should, directly or indirectly, take into his house to use any art, trade, mystery, or occupation, any journeyman, apprentice, or poor boy, but what should be resident in the town or liberties thereof, and disposed by the mayor and commonalty, or common council, under the forfeiture of 5s. per day for a boy, and 5l. for an apprentice.”

THE second bye law was, “that no foreigner should at any time, directly or indirectly, open his shop, or set up his trade, within the said borough, or liberties thereof, till he should have compounded with the town for his liberty, on the forfeiture of 5s. per day” (a).

WITH respect to the second custom, the whole court agreed that it gave no further power than what was incident to every corporation without a custom: but two of

(a) Carter, 68.

the judges, Archer and Brown, held, that the first was a bad custom: their reasons, however, as given in the report of the case (*a*), are not very satisfactory: they admit the distinction between such a restraint by immemorial custom, in a corporation by prescription, and by a bye law without a custom to support it; they admit, that, in the former case, the public exercise of a trade, within a corporation, might be restrained as to foreigners (*b*); and they admit, that in the case before them, the custom was immemorial, and in a corporation by prescription: but they make a frivolous distinction between the words "trade" and "mystery," and say, that in the case before them, the custom, being laid against using any *mystery* in the corporation, was not good, and yet they agree, "that had the word *mystery* been joined with the word *trade*, and named the trade," it would have been good. Their opinion, too, is as little supported by the cases (*c*) cited in its favour, as by the accuracy of their reasoning.

BUT admitting the custom to be good, they say, that the first bye law goes beyond it; that the custom limited the restraint to the borough; but that the bye law extended to the liberties, which might be more extensive than the borough, as examples of which they mentioned the cases of the cities of Coventry, Gloucester, and Lincoln, and the town of Grantham, which had several villages within their liberties, by the King's grant: that the custom was further exceeded by the bye law in this, that the former was, "that no stranger artificer should *use* any mystery, &c." whereas

(*a*) Carter 115, 117.

(*b*) Here, and in similar places, the word "foreigner" means no more than a stranger to the corporation.

(*c*) Case of city of London, 8 Co. 125, Norris v. Staps, Hob. 210, taylors of Ipswich, 11 Co. 53, Dr. Bonham's case, 8 Co. 127.

the latter was, "that no stranger artificer should *take any journeyman, &c. into his house, to use, &c.*

THEY objected further "that this bye law not only related to taking in future any apprentice or boy, but to retaining any formerly taken; so that a poor boy must either break the covenants of his indentures of apprenticeship, or break the bye law:"—by the terms of the bye law, however, as given in the report, there seems no foundation for this objection.

THEY objected, likewise, to that part of the bye law which confined the employment of journeymen, &c. to such as should be *disposed by the mayor and commonalty, or common council*; this, they said, might force a servant on a foreigner who was taken out of the hospital; that even out of this hospital, he would not have the privilege of choosing the person he preferred; and he might have one put upon him, who might pry into his secrets.

As to the second bye law, they said, "it was against the liberty of the subject, that no foreigner artificer should set up in the borough without compounding for his liberty with the *town*; that beside being against the liberty of the subject, it was *insensible*, that he should compound with the *town*. Who were the town? not the corporation, they said, for that was composed but of a few; by the common law the defendant might freely exercise his trade; and a custom, or a bye law to restrain the freedom of the common law, must not be expressed in tropes and figures.

THE two other judges, Tirrel, J. and Bridgeman, C. J. agreed in opinion, that the custom, as here set forth, was like that in Wagoner's case, and therefore good: but Tirrel held, that both the bye laws were within the custom, and therefore good; whereas Bridgeman held, that the second only was good, and the first bad.

TIRREL contended, that if the custom were admitted to be good, the first bye law was so too; because, if a man might not set up a trade, he might not employ any other person in it; that the custom imposed a general restraint, and the bye law was a qualification of it; and that the liberty of the subject was not restrained by a bye law, when that was warranted by a custom: it had been said, that the bye law exceeded the custom, because it extended to the liberties; he answered, that it did not appear there were any liberties beyond the borough, and the court were not bound to suppose there were: it had been objected, that this bye law restrained men from working privately in their families; this, he said, was not the real sense of it; but it appeared to be the intention of the makers of it only to restrain the setting up of trades; and if the defendant had only retained a workman to work privately in his family, he might have pleaded that specially.

BRIDGEMAN held, that this first bye law was bad; and his reason seems to be, though not very accurately expressed in the report (*a*), that it was beyond the extent of the custom.

TIRREL and Bridgeman both agreeing, that the second bye law was within the custom, and therefore good; observed, that it was not so much an extension as a relaxation of the custom: the latter restrained a foreigner from exercising a trade within the town; the bye law enabled him to do it by *compounding* with the town: it had been said, that opening a shop was no offence, and it did not appear that the defendant had exposed any wares to sale; to this they answered, that to open a shop was in common acceptance to set up a trade, and that to say of a tradesman, "his shop was shut up," was to say, "that he had failed."

(*a*) Carter, 121.

In answer to the objection, that it was insensible to say, that he must compound with the town, he observed, "the town" could not be taken to mean the *walls* of the town, or the spot on which the houses were built, but must mean the governing part of the inhabitants.

In an action on the case, brought by the mayor of Winchester, the declaration stated, that Winchester was, from time immemorial, an ancient city, and that there had been immemorially a custom in the city, that it should not be lawful for any person, but the freemen of the merchants guild of the city, to use or exercise publicly within the same city, any mystery, art, or manual occupation, which had been used during all the time aforesaid (*a*), unless such person, by the space of seven years before, had been educated as an apprentice *in the same city*, to or in such mystery, art or occupation, or were thereto otherwise lawfully authorized according to the custom of that city: then it brought the defendant within the description of persons not intitled by the custom, and assigned a breach: on the general issue there was a verdict for the plaintiff, and a motion afterwards made in arrest of judgment.—After two arguments at the bar, in which Wagoner's case had been relied on by the plaintiff's council, as an authority, that such a custom in general was good, Holt, C. J. said, "that case was of such a custom in London, but he would be glad to see a case, where such a custom had been allowed good in any other borough or city; that this point had not been so well settled as had been assumed; and that even in Wagoner's case, the defendant had been discharged (*b*): that the subject came in question again in the Common Pleas, in the

(*a*) That is, immemorially.

(*b*) Vid. ante, p. 141, but there it appears that the discharge was on account of a supposed defect of the averment of the breach.

18 and 19 Car. 2, in a case relating to the town of Colchester (*a*), where such a custom was laid, and a bye law founded upon it, and the case had great agitation, but was never determined; and that he had the arguments in that case in a report under Chief Justice Bridgeman's own hand. There was no reason, he said, to support such a custom especially to give the corporation an action; for that the exercise of a trade, though by a person not qualified, was no prejudice to the corporation: all persons were at liberty to *live* in this place, and their skill and industry were the means by which they were to support themselves; it was therefore unreasonable, that they should be restrained from exercising their trades: the custom of London, for excluding persons from using trades there, who were not free, was founded on customs which they had, relating to the education of youth within their city, and qualifying them to be freemen, which other cities had not, and therefore such a custom was reasonable there; but it did not follow from thence, that it was reasonable any where else, where there were no such auxiliary customs."

THE other judges (*b*) all expressed their doubts about the validity of such a custom; but they gave judgment in favour of the defendant on another point (*c*).

NOTWITHSTANDING these doubts, however, it is now considered as a settled point, that such a custom, and a bye law founded on it, are good, and that there is no distinction, in this respect, between the city of London and other cities and towns.

THUS, where it was stated, that there had been, from time immemorial, an ancient custom in the city of Bath,

(*a*) The case immediately preceding.

(*b*) Powell, Powys, and Gould.

(*c*) Mayor of Winton v. Wilks, 2 Lord Raym. 1129.

“that no stranger person had of right used or exercised, or of right ought to use or exercise the craft or mystery of a taylor, within the city aforesaid, unless he were free of the same city;” and that a bye law had been made, which ordained, “that no stranger nor foreigner, at any time after the making of the bye law, should use or exercise the craft or mystery of a taylor, within the said city, unless he should be first made free of the said city, under a penalty of 3s. 4d. per day:” Lord Mansfield said, with the concurrence of the court, “there is nothing of doubt in this case. The custom is good, and warranted by a vast number of cases” (a).

WHERE the object of a bye law is merely to prevent fraud, and the provisions of it do no more than accomplish that object, then, though in strictness a *restraint* may be laid on the freedom of trade, it will be considered only as a reasonable *regulation*, and, consequently, no custom will be necessary to support the bye law.—Of this kind is the law of London, before mentioned (b), respecting the Blackwell-hall factors, by which it was ordained, “that if any citizen, freeman, or stranger, within the said city, put any broad cloth to sale, within the city of London, before it was brought to Blackwell-hall to be viewed and searched, so that it might appear to be saleable, and that 1d. might be paid for hallage for every cloth, he should forfeit for every cloth 6s. 8d.” (c).

So, a bye law which has in view principally the regulation of police, though it prohibit the exercise of a particular trade, within certain limits, is good without a custom.—Such is the bye law, before mentioned (d), of the city of

(a) Woolley et al' v. Idle, 4 Bur. 1951.

(b) Ante, p. 104.

(c) The chamberlain of London's case, 5 Co. 62 b.

(d) Ante, p. 104.

Exeter, "that no butcher or other person, should, within the walls of the city, slaughter any beast." So a bye law is good, which prohibits, under a penalty, the making or using of any dangerous machine within a city; such is the bye law of the city of London, "that no one shall make a hot press, nor use it in the city, under a penalty of 10*l.* for making, and 5*l.* for using it;" because the use of these presses is dangerous with respect to fire (*a*).

So a bye law is good without a custom, which prohibits the exercise of some particular obnoxious trades in some particular streets of a city; as "that a man shall not set up a tavern in Birchin-lane," or "a brew-house in Fleet-street," or "a butcher's or tallow-chandler's shop in Cheapside" (*b*).

BUT, if under pretence of a regulation of police, a bye law be made, restraining trade, for the purpose of private gain, such a bye law cannot be good without a custom to support it. Thus, where it appeared, in the case of *Pain and Haughton* (*c*), that the city of London had made an act of common council, "that no carman should go with his cart on the streets of London without a licence, for which he should pay a certain sum of money to the president of a certain hospital, for the use of the poor of that hospital;" this was adjudged void, because it restrained the liberty of the trade of a carman.

BUT, in the case of *Player and Jenkins* (*d*), where it was returned, "that by the custom of the city of London, the mayor and aldermen had power to regulate all the carts and carmen within the city; that certain ordinances were made, by which the power of ordering carts was given to

(*a*) 1 Rol. Rep. 312. 1 Rol. Abr. 365. 3 Salk. 76.

(*b*) March 15. 1 Sid. 284. (c) 1 Rol. Abr. 364.

(*d*) P. 18 Car. 2, cited *Skinner* 381.

Christ's Hospital, by the governors of which an order was made, "that no one should use his cart within the city, without their licence, and that there should be but 400 carts used within the city; and if any one not licenced should use a cart there, he should forfeit 40s." this, upon the whole matter set forth, was resolved to be a good bye-law; and the same decision had been given in another case some time before, on the same bye law (a); but the reason given for these resolutions was, "that the mayor and aldermen intitled themselves, by special custom, to the power of regulating all carrs and carmen, within the city:" and in a subsequent case (b), on the same bye law and special custom

(a) Gavell and Tasker, Hil. 14 and 15 Car. 2.

(b) Player and Broadnax. The case of Broadnax was on a *habeas corpus* brought to remove him, he having been taken by process on a plaint exhibited in the court of the sheriffs of London, and it was returned, that, time out of mind, the mayor, aldermen, and common council of the city, had had the government and regulation of trade within the city, and power to make bye laws concerning the same, and that they had made a bye law, that there should be but 420 carts allowed to work within the city, all which should be licenced by the president of Christ's Church Hospital, and that there should be paid for the licence of every carr, 11. and 17s. per annum to the said president, to be employed for the use of the poor within the hospital; and that none should use a carr without such licence, under a certain penalty, to be recovered, &c. provided, that all persons might send their own carrs to the wharfs, &c. and carry goods in their own carrs from wharfs, except such as should be traders or retailers in fuel.

That Broadnax, without such licence, wrought with a carr *pro lucro suo proprio*, and for the penalty forfeited thereon, a plaint was levied against him, &c.

In behalf of Broadnax, it was prayed, that there might be no proceeding, because, though the bye law should be admitted to be good, having custom to warrant it, yet it appeared, that the plaint was insufficient, for in that no custom was alleged.

custom, Lord C. J. Hale declared, that, without a custom, the bye law would have been void, though, with the custom, it might be good.

On the principle of this distinction, depended the chief arguments against a bye law made by the mayor, aldermen, and common council of the city of London, by which, after reciting, "that the number of hackney coaches driving, standing, or waiting within the city, was greatly increased, and had become so great, and that the streets and common

It was also contended, that it was unreasonable that such as traded in fuel should not be permitted to bring home the wood, which they bought in the country, in their own carts, or to carry it out to their customers; for, though they might limit the number of carmen, which, in too great a multitude, would be a nuisance, and infest the streets, yet they could not restrain a man from using his own carrs, to carry his own commodities.

As to the first, the court were of opinion, that it was not necessary to mention the custom in the plaint, because it was *lex loci*, and they took notice of their own custom in their own courts; and the court instanced a similar thing, in a custom of Norwich, which is, that in debt, on a specialty, the debtor *fatetur scriptum, sed petit quod inquiretur de debito*, and no custom is set forth in the record to warrant that, (vid. 1 Ventr. 256, 1 Mod. 96, for this custom of Norwich). But here in the *habeas corpus* they had returned the custom, which shewed they had good cause to proceed upon their plaint.

As to the second, the court doubted whether this bye law could be adjudged reasonable or good, because it would restrain the woodmongers from bringing their wood, &c. home in their own carts; so that, though they brought it in the country carts as far as the liberties of the city, they must then unload, and put it in city carrs, which would be extremely inconvenient, as it would be, if they should send city carrs to fetch it; and though it might be reasonable to prohibit their carrying their own commodities out in their own carrs, that they might not have so great an opportunity to cheat in their measures; yet there could be no colour to restrain them from bringing them in. Adjournatur 1 Vent, 195-7.

passages

passages of the city were so filled and pestered by the driving and standing of such hackney coaches, that the citizens and people repairing the to city were interrupted, and the trade of the city thereby prejudiced ;” for the remedy of these inconveniences, and that hackney coaches, to be employed within the city, might be under some regulation and government, agreeably to what had been already provided concerning carrs, carts, and carmen ; it was enacted and ordained, “ that from and after the first day of May, then next ensuing, the number of hackney coaches to be employed within the city and liberties, should not exceed 400; and that no person, after the said first day of May, other than such as should be licenced according to that act, except only stage coaches to and from their inns, and coaches which should take up a fare *out* of the city, to be carried into or beyond the city, while they should be, without delay or covin, driving to such place in or beyond the city, should, by himself or his servants, drive for hire any hackney coach, or stand therewith to be hired within the city of London or the liberties, under the penalty of 40s. for each offence,”

It was confessed, that if the mayor, aldermen, and common council had entitled themselves, by a custom, to the governing and ordering of the hackney coaches, as they did of the carts, it would have been impossible to distinguish the present case from that of Jenkins and Player ; but it was insisted, that no such custom being returned, and it being impossible that there should, as hackney coaches were of late institution, and therefore could not be the subject of a custom, this foundation failed, and the bye law manifestly imposing a restraint on a lawful occupation, was consequently void. The case was adjourned, and the
city

city never thought proper further to agitate the question (a).

IN the return to a *habeas corpus*, directed to the mayor, aldermen, and sheriffs of London, they set forth a custom, by which the mayor, aldermen, and commons of that city, had the right of regulating, ordering, and disposing all carrs, drays, or brewers carts, and all persons driving or working such carrs, drays, or carts, within the city and liberties, for preventing annoyances in the streets, lanes, and common passages of the city.—They returned, likewise, the general custom, by which they possessed the power of making bye laws, and then set forth a bye law, made in pursuance of these customs, by which, after reciting, “that the streets were annoyed by drays and carts standing in them, whereas their work might be done early enough before the streets were filled with coaches and passengers,” it was enacted, “that no drayman or brewer’s servant should be allowed, with his dray, in any of the streets, lanes, or common passages of the city, in any day from Michaelmas to Lady-day, after the hour of one in the afternoon, and from Lady-day to Michaelmas, after the hour of eleven in the forenoon.”

THE court thought this case of sufficient importance to require a solemn argument, and accordingly it was twice argued. At the time of the first argument, Lord Hardwicke was on the bench, and expressed the inclination of his opinion to be in favour of the bye law: it was certainly, he said, in some degree, a restraint on trade, and therefore it might be too much to say it would be good without a custom to support it; but it seemed to be made under the authority of the custom set out; and the question, therefore, was, whether it was properly made for enforcing

(a) *Skinner*, 384. 4 Mod. 229.

the custom and carrying it into execution. The case of Player and Jenkins had gone a good way, and he did not see that this went further, for then it might have been said, that a man's trade might increase so as to want carts; and with respect to the present case, it was certain this working of drays might be a nuisance.

AFTER the second argument, Lord C. J. Lee delivered the opinion of the court to this effect; that where there was a custom to regulate any part of trade, a reasonable bye law agreeable to that custom was certainly good, and where the exercise of trade was in its nature a nuisance, the interposition of this authority to restrain it was highly proper; that the general rule of bye laws no doubt was, that they must be reasonable, and not prejudicial to the King or the subject, but that when the object of a law was to prevent nuisances, the consideration must be on the convenience in general, taking in the crown, the party, and the people; and where the general convenience was greater than the inconvenience, the bye law might be proper and reasonable, which was the case of the bye law in question (a).

A BYE LAW may be good in part, and void for the rest (b), for where it consists of several particulars, it is to all purposes as *several* bye laws, though the provisions be thrown together under the form of *one*.—Thus, the bye law regulating the corn porters, which ordered, “that none but free porters should intermeddle in importing or exporting any corn, roots, &c. within the limits of a custom to which the law referred, and imposed a penalty on the person who should so *intermeddle*, and also on the

(a) Bosworth v. Hearne. 2 Str. 1085. Andr. 91. B. R. H. 405.

(b) Per Pratt, C. J. Str. 469, et vid. Sayer, 256, acc. Vid. in Carter, 121, a dictum to the contrary by Bridgeman, C. J.

person who should employ any not free of the company ;” this bye law, in an action brought against the employer, was held void, as to the penalty imposed on him (*a*), but in an action brought against the person intermeddling, was held good (*b*).

It was formerly doubted whether those corporations who have exclusive customs, have an original right of action for the breach of them (*c*) ; but in an action on the case, by the corporation of Colchester against one Sympson, for exercising a trade within the borough, not being a free-man, contrary to the *custom*, it was in the 5 G. 2, solemnly determined by the court of Common Pleas that they have (*d*) : it is not, therefore, *necessary* for the corporation, having such a custom, to make a bye law to enforce it ; but such a bye law is convenient for the sake of fixing the penalty at a precise sum.

To secure obedience to a bye law, it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the bye law will be nugatory (*e*) : the only penalty admitted by the law of England is a pecuniary one, though either that may be recovered by action or the payment of it enforced by distress of the offender's goods (*f*).

THAT obedience to a bye law cannot be enforced by imprisonment of the offender (*g*), or by the forfeiture of his goods (*h*), there are a multitude of authorities ; and

(*a*) Cudden v. Estwick, 6 Mod. 123.

(*b*) Fazakerly v. Wiltshire. Str. 462.

(*c*) Vid. Gro. El. 803. 6 Mod. 21.

(*d*) Cited 1 Wils. 237.

(*e*) “For,” says Lord Coke, “oderunt peccare mali formidine pænæ.” 5 Co. 63, b. 3 Leon. 265.

(*f*) 5 Co. 64, a.

(*g*) Moore, 411, n. 563. 5 Co. 64, a. 8 Co. 127, b.

(*h*) 8 Co. 127, b. 1 Bulstr. 11, 12.

the reason assigned is, that these are both against magna charta.—If these modes be adopted, an action of false imprisonment in the one case, and trespass for the taking of the goods in the other, may be maintained by the party who has been imprisoned, or whose goods have been seized (*a*).

NEITHER can a bye law be enforced by avoiding any bond or covenant made in contravention of it. Therefore, if a bye law be made, “that if any freeman take as an apprentice the son of a stranger, the bonds and covenants in the indenture shall be void;” this is a bad bye law as to the avoidance of the bonds and covenants, whatever may be said of the substance of it, as prohibiting the taking of the son of a stranger for an apprentice: it ought to be enforced by a pecuniary penalty on the master for taking him (*b*).

THE penalty must be in a sum certain, and not left to the arbitrary assessment of the makers of the law, according to circumstances, even though the utmost extent of the sum be limited (*c*). So, a penalty certain imposed by a bye law made by the tenants of a manor, must be levied as it is, without affeermment (*d*).

WHERE the penalty is given in general terms, without specifying to whose use it is to be applied, it is to be understood to be to the use of the corporation; and if no mode of recovery be specified, it may be recovered by action of debt, or by action on the case on *assumpsit* (*e*), in any of the courts of Westminster Hall (*f*), in the name of the corporation (*g*). So, if it be expressly

(*a*) Clarke's case, 5 Co. 64, a. 1. Term Rep. 118. Ante, p. 109, 110.

(*b*) Moore, 411 n. 562. (*c*) Bridge. 139.

(*d*) 3 Leon. 8.

(*e*) 2 Lw. 252. Clift. 901, 902, cited Com. Dig. Bye Law, D. 1.

(*f*) Vid. 1 Rol. Abr. 366. (*g*) 1 Will. 235.

limited to the use of the corporation, but no provision be made in whose name it shall be sued for, the action must be brought by the corporation itself (a). But it has been the practice in many cases to appoint the penalty to be sued for, in the name of the chamberlain, or some officer of an equivalent denomination (b), and this, in the case of the Blackwell-hall factors, was allowed to be a proper mode of proceeding (c); nor does it appear that any objection had been taken to it till the case of Hollings and Hungerford in the 3 G. 1 (d). That was an action of debt, brought by the chamberlain of Bristol for the recovery of a penalty of 200l. imposed, by a bye law, on every man who should be chosen a common councilman, and should not appear within a certain time and take the office upon him: on behalf of the defendant it was argued, that the chamberlain was a stranger to the corporation; that he was a stranger to the right, and therefore a stranger to the remedy, for that the right was in the corporation; but Lord C. J. Parker, and the rest of the court, held that the action was well brought, and that "the chamberlain," necessarily meant "the treasurer" of the corporation; that he was not a stranger, but a part of the corporation; and therefore that the court would take notice of the relation there was between them.

BUT the power of suing for the penalty cannot be given to a mere stranger:—In the case of Bodwick and Fennel (e), the penalty of 4l. for the breach of a bye law of the town of Devizes was given to *any person who should sue for the same*; the action was brought in the borough court, the

(a) Vid. master, &c. of vintners' company v. Passey. 1 Bur. 235.

(b) 5 Co. 63, b. B. R. H. 406. Sayer, 254.

(c) Chamberlain of London's case, 5 Co. 63, b.

(d) Cited 1 Wils. 235.

(e) 1 Wils. 233.

defendant

defendant there demurred, and judgment was given for the plaintiff; a writ of error was brought in the King's Bench, and that court, after solemn argument and much deliberation, reversed the judgment, on the principle, that the corporation could not give the action to a stranger, but must either sue for the penalty in their own name, or in the name of some particular officer, as their chamberlain or treasurer.

So, where a bye law made by the mayor, aldermen, and commons of the city of Bath, for the better preserving a custom, by which "any one not free of the city and of the taylor's company there, was excluded from exercising that trade within the city," gave a penalty to be levied by distress, or recovered by action of debt, by the *masters* of the said company for the time being; the bye law was held bad in giving the action to the latter, because they were *strangers* to the corporation of Bath, by whom the law was made (*a*).

BUT though the action cannot be given to a mere stranger, it is not absolutely necessary that the penalty should be given to the corporation; it may be, and frequently is, given to the person who shall give information of the breach, and to the poor in different proportions (*b*); sometimes part is given to the informer, part to the poor, and a part not expressly appropriated; in which case the latter part belongs to the corporation (*c*).

THE penalty of a bye law may be directed to be recovered in the courts of the corporation within which the bye law is made, provided the members of the court, or

(*a*) *Totterdell and Harris, masters of the taylor's company at Bath, v. Glazby.* 2 Will. 266.

(*b*) *Vid. B. R. H. 406. Sayer, 254.*

(*c*) *Vid. 3 Bur. 1848.*

the jury, or the officer who returns the latter, be not interested in the penalty, or the subject of the bye law which the penalty is intended to enforce. But if any part of the penalty is to go by the terms of the law to any of those who necessarily compose the court, it cannot be *recovered* in that court. Thus, where debt was brought in the court of the mayor and aldermen of the city of London, to recover 400l. the penalty of a bye law made by the common council, of which 300l. was to be applied to the use of the mayor and commonalty of the city; it was held, on a writ of error, that though the mayor and commonalty might make a bye law, limiting the penalty to themselves, yet it could not be recovered in the court of the mayor and aldermen, *unless* the mayor could be severed, and the court held before the aldermen alone, in which case it was said it might, from the same reason that the Chief Justice of the Common Pleas might bring an action in that court, with a special entry of "pleas before J. Blencoe, Knight, &c." omitting the Chief Justice, because the other judges are a court without him: but with deference to Holt, whose comparison this is, it does not seem a fair one, because, if the mayor could really be severed, yet the rest of the court have an interest as members of the corporation; the comparison would only apply if the penalty were given to the mayor alone, to his own personal use, without the commonalty.—The C. J. however, states explicitly, that if the mayor be an integral part, so that there can be no court without him, but that it must necessarily be the court of the mayor and aldermen, the penalty cannot be recovered there; which is in fact the case; for though the mayor absent himself, and the recorder sit for him, and that too by the custom of the city, yet that makes no difference; for though the recorder in fact preside, and the
judgment

judgment be *personally* his, yet in contemplation of law, it is the act of the mayor : the recorder is his deputy, and his act the act of his superior (*a*).

NOR, if the subject of the bye law be the assertion of the privileges of the freemen of the corporation against strangers, can the action for the penalty be brought in the corporation courts, where the jury, or the officer who returns them, are necessarily freemen.—There are three principal cases on this subject, the two first of which, as far as they go, seem to contradict this principle ; but the third completely establishes it.

THE first is the case of Bodwic and Fennel before mentioned (*b*), in which one exception taken in favour of the plaintiff in error, was ; that the court where the action was brought, was held before the MAYOR, RECORDER, and BURGESSES of the DEVIZES ; that the action was indeed in the nature of a popular action, brought by a *stranger*, but yet it must be considered as instituted for the benefit of the corporation, so that both the judges and jury were to judge in their own cause ; because the breach assigned was on the *custom*, and not on the bye law, the latter being introduced only to fix the damages, and the former being manifestly for the benefit of the corporation. This objection, however, was not conceived by the court to carry much weight with it, and the judgment was given, as has been already seen, in favour of the plaintiff on another point.

THE next case was that of Harris and Wakeman, which was a writ of error brought on a judgment given in an action of debt, brought in the court of the mayor of Worcester.—The plaintiff below alleged in his declaration that

(*a*) Mood v. the mayor and commonalty of London. Salk. 397, 8.

(*b*) Ante, p. 158. 1 Will. 233.

he was chamberlain of the city of Worcester; that by a custom of that city, no person, not being a freeman, ought to sell or put to sale by retail, any goods within the said city, or the liberties or suburbs thereof; that by another custom the corporation had a power to make bye laws; that a bye law was made, by which a penalty of 4*l.* was imposed on every person, not being a freeman, who should shew, sell, or put to sale any goods by retail, or keep a shop for the shewing, selling, or putting to sale of goods by retail within the city, or the liberties or suburbs, to be recovered in an action of debt, brought in the mayor's court, in the name of the chamberlain: it appeared that issue was joined in a plea of "nil debet;" and that there was a verdict and judgment for the plaintiff: it appeared likewise from a bill of exceptions, that the jurors were freemen; that the judges were members of the corporation; and that the objections, made at the trial, on these accounts were over-ruled.—The judgment, after great consideration, it is said, was affirmed, and the court declared that these objections were very *properly* over-ruled (a).

THE third case was that of Hesketh and Braddock, which was a writ of error brought in the King's Bench, from the court of Great Sessions for the *county* of Chester, who had reversed the judgment of the Portmote court of the *city* of Chester, in an action of debt brought there for the recovery of a penalty on a bye law made by the corporation of that city; the bye law was founded on an exclusive custom, and the breach assigned in the defendant's keeping an open shop, and exercising the trade of a grocer, within the city, without being a freeman: the defendant pleaded "nil debet;" issue was joined, and a *venire* awarded

(a) Harris v. Wakeman, Sayer, 254.

to the sheriffs of the city of Chester. The defendant, on the return day of the venire, challenged the array of the pannel, because it was made by the sheriffs, who were citizens and freemen of the city; wherefore he prayed that the pannel might be quashed. To this challenge of the array the plaintiff demurred, and the defendant joined in demurrer: after the entry of the joinder in demurrer, the record proceeded thus: "and hereupon it is *judicially* taken notice of by the said court here, and is known to the same court, that by the custom and constitution thereof, and of the city aforesaid, *no* person or persons can or ought to array the pannel of any jury within the jurisdiction of the said court, or in any civil suit within the said city, other than the *sheriffs* of the said city, for the time being, or one of them, or, by reason of any default in the said sheriffs, the *coroners* of the said city for the time being, or one of them; and that by the custom of the said city, from time immemorial, no person or persons can or ought to be sheriffs or coroners of or within the said city, *but* citizens and freemen of the same city:" it then stated the judgment of the court, "that the said challenge of the defendant to the said array of the said pannel be disallowed; and that the said pannel of the aforesaid jury, so arrayed as aforesaid, be allowed and taken."—It then stated, "that the defendant, *ore tenus*, in open court challenged the polls: because the jurors, and each of them, were citizens and freemen;" this challenge was also disallowed by the Portmote court; on which the issue was tried, and a verdict found, and judgment given for the plaintiffs. A writ of error was then brought in the court of Great Sessions, where the judgment was reversed, and on this reversal the writ of error was brought in the court of King's Bench.

LORD Mansfield, after stating the case and the objections which had been over-ruled in the Portmote court, observed, that in answer to these objections, it had been argued for the plaintiff there, that neither the sheriffs nor the jurors were at all interested in the present suit; that it had been indeed admitted, that where a corporation are *parties* to the suit, or immediately interested in the very issue in question, no freeman could be either a juror or a witness: but that it had been said, that in this case the corporation were not parties to the action, nor in any way concerned in the point in issue; that the suit was by the treasurers in their *separate* capacity, and that whatever might be the event, the corporation could neither pay nor recover any costs; that, in *this* action, the object of litigation was merely the *penalty* of the bye law; and that, in that penalty, the corporation had no share nor interest. It had been further argued, that though the bye law was founded on a custom "to exclude all foreigners from the city," and the freemen might be said to have an interest in that exclusion; yet this was a *remote* consideration, which at most could affect only such of the freemen as happened to be tradesmen; that the circumstance of a freeman's being a trader was a particular *uncertain incident*, which if it happened to occur in any of the jurors might indeed warrant a challenge *for favour*; but that the *mere possibility* of such an interest was not sufficient ground for a *principal* challenge. It had also been observed, that the verdict for this penalty would not avail the corporation in any suit upon the *custom*; for that if the custom were to be litigated in a superior court, the corporation could not give this verdict in evidence. And as to the suggestion, it had been contended, that every court must judicially take notice of its own customs; and that as none but freemen could possibly be either sheriffs or jurors,

jurors, if the present objection should prevail, this bye law would be left without a remedy to enforce it; and that consequently there would be a failure of justice.

BUT we are all very clearly of opinion, continued his lordship, that in this case, neither the sheriffs nor the jury were competent; and therefore the challenge was improperly over-ruled at the Portmote court.—There was no principle, he said, more clearly settled than this:—That any degree of interest in the question depending, was a decisive objection to a witness; much more was it to a juror, or to the officer by whom the jury was returned.—The *minuteness* of that interest could not relax the objection: for the *degrees* of influence could not be measured: no line could be drawn; but in the present case, *every* member of the corporation was evidently interested in the very issue to be tried; for the *custom* “to exclude all strangers from trading in the city” was the foundation of the action; it was the only ground on which such a bye law could in any case be valid; as a bye law to “exclude,” without a custom to support it, would be void, as an illegal restraint on the common right of the subject: it was therefore necessary for the plaintiffs to allege this custom in their declaration; and the defendant’s plea of “nil debet” put the whole declaration in issue: on that issue the plaintiffs must *prove* the custom to exclude, as well as the bye law; and the jury must form their verdict on the whole; for *all* the facts must concur, to prove the defendant indebted to the plaintiffs. If there was no such custom, the bye law was a nullity, and consequently the defendant could not owe the penalty.—*Every* freeman, therefore, was interested in the *issue* to be tried: they might indeed have no share in the penalty itself; but they were interested in the facts on which the penalty depended.

THE exclusion of foreigners was a monopoly to the freemen themselves; to enforce this exclusion by bye laws and penalties was to secure that monopoly: and in this action the very freemen who were to gain by securing this monopoly were the jury to determine it.

IN the case of Bodwic and Fennel it had been stated at the bar, that "no exception or challenge had been taken:" and, as a party might wave all exceptions, if he pleased; if he did *not* object, it was a virtual acquiescence.

IN Wakeman and Harris, there was also no challenge; and the bill of exceptions was *not sealed*; the court, therefore, could take no notice of it.

IT had been said, that if the defendant's challenges were allowed, the corporation would be left without remedy on the bye law.—The answer was, that if the fact were true, "that they could impanel no jury but of freemen," the fault was their own in confining the action to their own court. On the other hand, if they had a power to impanel non-freemen, which it was probable they had, as the city was a county of itself, it was their own fault that they did not do it.

IN the regulation of their own members they might, indeed, make bye laws, and enforce the observation of them by prosecutions among themselves; because every member of the corporation was bound by the jurisdiction into which he voluntarily entered; and all being freemen, their circumstances were equal. But if corporations were to try their *own* suits against *strangers*, on a bye law excluding all traders but themselves, there would be an end of the distinction which had long been established, "that a bye law which lays *this* restraint on trade is void, unless there be a *custom* to support it."

IF the custom was a necessary foundation for the bye law, it was necessary to *prove* it: but if the freemen themselves

selves might determine the question, they would not be very exact in that proof; and bye laws themselves, without such custom, would soon have an equal effect.

HAD this bye law been *general* without limiting the action to the treasurers, or to their own court, they might then have tried it in a *superior* court, and the whole would have come to a proper decision.—We are, therefore, concluded his lordship, all of opinion, “that the judgment of the court of Great Sessions, reversing the judgment of the Portmote court, ought to be affirmed” (*a*).

IN an action of debt, for the penalty of a bye law, the time when it was made, the parties by whom it was made, their authority to make it, the custom on which it is founded, if it be founded on a custom, the bye law itself, and the breach of it by the defendant, must be all set forth; that the court may judge both whether the bye law be good, and whether the defendant be a proper object of the action (*b*).

IN debt on a bye law, the wager of law is not permitted, as it does not come under the principle on which it was permitted in actions of debt at common law (*c*).

THOUGH the penalty of a bye law may be levied by distress, yet it is said, that mode cannot be adopted, without a prescription to distrain, unless the bye law expressly appoint it (*d*).

BUT in justifying a distress for the penalty of a bye law, made by the homage of a manor at a court baron, authorised by custom, it is not necessary to *prescribe* to levy the penalty by distress; for the prescription being of the power to

(*a*) Hesketh v. Braddock, 3 Bur. 1847—1859.

(*b*) Vid. Hut. 5 Hob. 211. 1 Str. 539. Brownl. and Gouldf. 177.

(*c*) Vid. Salk. 682, 3, 4. (*d*) 1 Rol. Abr. 367, cites 5 Co. 64, and Dy. 15 El. 321, vid. Bridge. 139.2 Ventr. 183. 3 Salk. 76.

make the bye law, and the bye law itself ordaining the distress, it is the same thing as if the prescription had directly authorised the distress (*a*).

WHERE a bye law orders the penalty to be levied by distress, it has been a question, how that distress is to be made:—the penalty of 10s. in the case of the merchant taylors, was to be levied by the master and wardens, by distress or otherwise; they gave a power of attorney to levy it: it was objected, that this authority to distrain was limited to the master and wardens, from a confidence reposed in their discretion, to take a reasonable distress, and at a convenient time; and that, therefore, they could not give a power of attorney to make the distress; it was answered, and the answer seems a good one, that the power of making the distress was referred to the master and wardens in their politic capacity, and not in their natural persons, and that, therefore, they could not act otherwise than by making a letter of attorney. But this point remained undecided, the judgment being given on the bye law itself (*b*).

WHERE a penalty was given to the two bailiffs of a town, and appointed to be levied by distress, but it was not said by whom to be made; it was held, that as it was not appropriated to the use of the corporation, it must be intended, that it was to be paid to the bailiffs for their own use; in which case either of them might distrain for it (*c*).

WHERE the penalty is to be enforced by distress, it has been doubted, whether the distress can be carried into effect by the *sale* of the goods (*d*). It seems, by the general current of authorities, that it cannot (*e*).

(*a*) Ld. Raym. 92.

(*b*) Moore 591. Vid. Lutw. 1331. Com. Rep. 269. Ante, 132.

(*c*) Sayer, 183, vid. 1 Anderf: 234. (*d*) 1 Keble, 733.

(*e*) Vid. 3 Lev. 28. Clarke v. Tucket. 2 Vent. 183.

IN justifying a distress for the penalty of a bye law, the defendant must allege the breach in the offender directly as a matter of fact; "that it was presented before the court of a manor, that he committed the breach," is not sufficient (a).

THOUGH a bye law cannot be enforced by *imprisonment*, yet there are several cases in the books, which seem to intimate, "that a *custom* for a court of record, within a corporation, to imprison for a disobedience of order," is good.

ON the return to a writ of habeas corpus, it appeared, that the defendant had been called before the court of aldermen in London, for having forestalled fish; that when ordered not to forestall, he had refused obedience to the order, and affirmed, that he would not conform to it; and that in pursuance of a custom, they had committed him till he should promise obedience: it was objected, that this custom was bad, without the addition of the alternative, "till he should be delivered by due course of law;" to which it was answered, that it was not necessary to allege the delivery by due course of law, in the statement of the custom, though in the commitment that clause must be inserted, which, in fact, in this case, it was. The court held the custom good (b).

WHATEVER be the mode of enforcing obedience to a bye law, prescribed by that bye law, that mode must be strictly pursued; therefore, where a bye law appointed, that a penalty should be incurred for the offence to prevent which it was made, and that on *due* proof being made of refusal to pay the penalty, by the party offending, it should be levied by distress; the defendants to an action of

(a) 3 Leon. 8.

(b) City of London v. Coates, 2 Keb. 752, 3. 1 Vent. 115.

trespass justified themselves by alleging that *due* proof of the refusal had been made before the master and wardens, &c. this was held insufficient, on the ground that the *due* proof intended by the bye law must be proof by verdict; though it was admitted, that had the bye law expressed, that on proof being made before the master and wardens, &c. that would have supported the justification (a).

So, if a bye law enact "that on proof of refusal the master, &c. may enter into the house, booth, or shop, warehouse or cellar of the offender," and the justification do not aver that the goods distrained were in any of these places, but only in the city at large, this will be insufficient (b).

THE validity of a bye law may be called in question, by an action expressly brought to recover the penalty; or, if the mode of enforcing obedience be distress, by an action of trespass by the party on whom the distress is made (c).

So, it may be called in question, on the return to a mandamus, where the party to whom the writ is directed, justifies his refusal to do the thing commanded, under the authority of the bye law (d).

So, if the penalty be ordered to be recovered by action of debt, in the courts of the corporation, the validity of the bye law may be questioned, in every case but in that of the city of London, on a writ of error in the King's Bench (e).

So, in the case of the city of London, the validity of a bye law may be determined on motion, in a summary way, on the return to a habeas corpus: in which case, the special matter of the bye law must be returned, as well as all the proceedings thereon, and every thing which is necessary to be stated in an action of debt in a superior

(a) Bridge. 141.

(b) Id. ibid.

(c) Sayer 185.

(d) Vid. 3 Bur. 1322.

(e) Vid. Harris v. Wakeman, Sayer. 254.

court; and it seems, that if the writ be delivered before the plaintiff has declared in the inferior court, he ought immediately to enter his declaration, that it may be returned on the habeas corpus, and the cause of action appear to the court (a).

BUT this summary mode of deciding on the validity of a bye law is confined to the case of the city of London.

A WRIT of *habeas corpus cum causa*, from the court of King's Bench, having been directed to the mayor, aldermen, and citizens of the city of Worcester, they returned a bye law, which ordered the penalty to be recovered by action of debt, in the name of the chamberlains, in the court of Pleas, held for the said city, and *not elsewhere*: a motion being made for a procedendo, and cause ordered to be shewn against it, a preliminary doubt was made by the court, whether, in any other case but that of the city of London, the validity of a bye-law could be disputed in this summary way; they agreed, that this method had been always practised on bye laws returned into this court, to writs of habeas corpus cum causa, directed to the courts of the city of London; but they did not recollect any instances where the same thing had been permitted, in the case of any other city or corporation.

MR. Justice Denison, who had originally started this doubt, said, that such a distinction between the city of London, and all other cities and corporations, might, perhaps, arise from particular methods of recovery being established by the customs of London, which cannot be pursued in this or any other court: for on these writs of habeas corpus, the persons to whom they are directed, must shew a good cause of detainer; and if this court cannot proceed, as the customs of London authorise their

(a) Dict. in *Walton v. Clerk*, Carth. 75.

CHAP. VI.

OF THE MANNER IN WHICH CORPORATIONS ARE
VISITED.

IN order to maintain the peace and good government of corporations, and to secure their adherence to the purposes of their institution, the law has appointed a tribunal to inspect the conduct of their internal affairs, and to whose decision all disputes arising within them may be referred. This tribunal, in the case of eleemosynary and ecclesiastical (a) corporations, is, in general, that of a private visitor; of all other corporations, the court of King's Bench. The latter exercises its visitatorial jurisdiction in two different ways; by writ of mandamus, and information in the nature of quo warranto. The present chapter, therefore, may properly be divided into three different sections. First, Of a private visitor. Second, Of the writ of mandamus. And Third, Of an information in the nature of quo warranto.

SECTION I.

Of a private Visitor.

THE office and character of a visitor, seem to have been recognized, and, indeed, well known to the law, so early as

(a) Per Holt, C. J. 1 Show. 252, an ecclesiastical corporation always has a visitor, and therefore a mandamus was never known to have been moved for an abbot or prior.

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the beginning of the reign of Edward the third. In the year books (*a*), and the book of assizes (*b*), is the following case, which has been frequently cited, and made the subject of comment. One Henry Shirak, as warden of the hospital of St. Mary Magdalen of Ripon, brought an assize of novel disseisin against the archbishop of York, and William Poplington, and made his plaint of twelve messuages and two carues of land, one of the messuages being the hospital: the archbishop, by his bailiff, pleaded the general issue, *nul tort, nul disseisin*: Poplington, in proper person, answered as tenant, and said, that the plaintiff, Henry, was formerly warden of the hospital; that the ordinary of the place visited him, and for default found in him deprived him; and that afterwards the archbishop, who was patron, finding the hospital void, collated the defendant; to this the plaintiff, Shirak, replied, that King Edward the second, by his charter, of which the plaintiff made *profert*, gave him the wardenship for life, to hold as his freehold, and directed a writ to the escheator, to deliver seisin to him, which the escheator accordingly did: that one of the twelve messuages was the hospital, which, together with its appurtenances, was lay fee, of which the warden paid great and small tythes to the parish church, and was taxed among the laity, and not among the clergy, so that he was seised of a freehold in a lay fee till the time of the disseisin. The charter, of which *profert* was made, purported, that the King had given the wardenship as above, the presentation belonging to him by reason of the vacancy of the see of York.

(*a*) 8 Ed. 3, 69, 70, these are the folios taken from the beginning of the year, but in some cases, the volume in which this case is, is folio'd from the beginning of the volume, and 69, 70 correspond with 437, 438.

(*b*) Fol. 18, 19, 8 Ed. 3. pl. 29, 31.

ON behalf of the plaintiff, it was objected to the plea, that it did not shew *who* was the ordinary, who visited and deprived the plaintiff; to which it was answered, that it was sufficient to shew that he was visited by the ordinary of the place: it was further objected, that the plea ought to have shewn a *special* cause for which the plaintiff was deprived; to which it was answered, that the ordinary was the sole judge of the cause, and that whether the deprivation was by right or by wrong, the court could not enquire.

WITH respect to the plaintiff's replication, it was said, that as the presentation to the hospital, was in right of the archbishop, the plaintiff could have no other estate in it, by the gift of the King, than he would have had by the gift of the archbishop himself: that every warden of a hospital was visitable; by the patron, if it were lay; and by the ordinary, if it were spiritual: and that if the plaintiff had been in fact visited and deprived, and the wardenship given to the defendant Poplington, the former could not recover against the latter; but that if he was not visited, but ousted wrongfully by the defendants *without process issued against him*, he might recover in the assize. It was also said, by Herle, that the archbishop was ordinary; that it was confessed, by the plaintiff, that he was patron; and that although the defendant Poplington had pleaded a visitation in the character of ordinary, yet if it were found by the assize, that the archbishop visited not as ordinary, but as patron, the plaintiff could take nothing.—To this, however, the plaintiff's counsel objected, and asserted he was intitled to take advantage of the censurance made by the defendant.—What was the event in this respect does not appear; but whether the defendant might or might not be concluded by his mode of pleading, it seems a fair deduction, from what Herle says, that if it appear, that where
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the characters of ordinary and visitor at common law unite in the same person, he visits in the character of ordinary, when in fact the party visited is only visitable by the patron or common law visitor, the visitation is void, though the same person might have visited as patron or visitor.

In the discussion of the same case it was said, that if the plaintiff was visitable, and actually visited and deprived, he had lost his name of warden, and, therefore, he must sue to recover his name before he could be admitted to sue in assize: and Scrope, one of the justices, mentioned the case of an assize of novel disseisin, brought by the warden of an hospital in the county of Suffex, in which it was alleged against the plaintiff, that he had been visited and deprived for default found in him, to which he replied, that he had never gone before visitors, nor ever been called in judgment before them; but as he confessed that he was visitable, and as he had been deprived, the justices would not award the assize, without his suing first to reverse what the visitors had done; on which the Queen, who was patroness of the hospital, sent to the justices and claimed the conscience of the plea, as belonging to her in right of her patronage; and the conscience was granted.—A distinction of the same kind was afterwards taken (a) by Parning, a justice of the Common Pleas, “that where a warden of a chapel is deprived by one who has no title, he may have an assize to restore him by the name of warden; but where the ordinary, who has a title, or more properly, a jurisdiction, deprives him, there he must first recover his name of dignity before he can have an assize.”

WHAT is meant by the party “first suing to recover his name before he can be admitted to sue in assize,” does not appear very plain: it cannot certainly mean that he

(a) 13 Ass. 2, cited 4 Mod. 121.

should have an action on the case to recover his name; for if the ordinary courts will not take conusance of the sentence of the visitor in an assize, on the principle that he has an exclusive jurisdiction, so, on the same principle, they could not investigate the propriety of the sentence in an action to recover the name: it cannot mean that he should first sue to the visitor who deprived him, for by giving judgment that he should recover his name, the visitor of course enables the plaintiff to set aside his own sentence, which it is not very likely he will do.—The only meaning therefore, which it seems possible to attach to this observation, seems to be this; “that before the party deprived can sue an assize against the person who has been put in his room, he must appeal from the sentence of the visitor to the next superior, if there be one, to whom, by the law, an appeal lies from the visitor’s sentence, as from the bishop when he visits as ordinary to the archbishop, in order to have the sentence reversed.—If this be the true meaning of the observation, then we must suppose, that in the case cited by Scrope, the Queen being patroness, had appointed intermediate visitors, with the right of appeal to herself.—But on the same principle it follows, that in the case of a lay hospital, where the patron, or some one appointed by the founder, is visitor, who has no superior to whom an appeal can be made, the party deprived by the visitor has no remedy by assize.

THIS conclusion is indeed contrary to that of Sir Edward Coke, who, in James Bagg’s case (*a*), founds on this case of Shirak, this distinction, “that if a *layman* be patron of an hospital, he may visit it, and depose or deprive the master, for *good cause*; but if he be deprived *without just cause*, he shall have an assize, because he has *no other re-*

(*a*) 11 Co: 99, b.

medy; but if the *ordinary* deprive a master, who is ecclesiastical, *without a cause*, he shall not have an assize; because he has another remedy by appeal."

THIS opinion of Lord Coke, however, is by Holt, C. J. ascribed to a note in Dyer (*a*), at the end of the case of Dr. Coveney, who being president of Magdalen College, was deprived by the visitor, not in the character of ordinary, but in that of visitor; and the question was, whether an appeal would lie from the visitor's sentence to the *King*, for it was held there could be none to the *archbishop*, because the act was done not in the character of ordinary, but of visitor. "From hence it follows," says the reporter, "that Dr. Coveney, who was deprived, shall have an assize."—Of which conclusion Holt says (*b*), "and that was the cause of the opinion of Lord Coke, in James Bagg's case, who there cites the books 8 Ed. 3, and 8 Ass. for this distinction. But if we examine these books," continues Holt, "no such distinction is there to be found; the party is concluded in the one case as well as in the other: therefore there is an end of that opinion, for the foundation fails, and is not warranted by any authority. But besides, it is reasonable to suspect that case not to be law, when the thing is impracticable, which it is brought to prove.—The head of a college cannot maintain an assize for his office of headship; he hath not such an estate as will bear it: the head of such a body cannot maintain an assize for his headship, for he hath no sole seisin; the whole body of the college have an interest in the estate; the head has not a title to a penny of the revenues in his own right, till by consent they be privately divided and distributed; and then it is his own personal property as an individual, and not as a person having a corporate right."

(*a*) Dyer, 209.

(*b*) Skinn. 487. 2 Term Rep. 355.

By the common law, all *spiritual* persons and corporations, as parsons, vicars, deans, prebendaries, deans and chapters, are subject to the visitation of the ordinary; as were formerly *spiritual* hospitals, abbies, and priories (*a*). But free chapels and donatives are exempt from the visitation of the ordinary, and subject to that of the patron only, whether that patron be the King or a subject (*b*); and the King visits either by his chancellor, or by commissioners specially appointed; a subject patron, either by commissioners or in person (*c*). There were likewise some abbies and priories, and *spiritual* hospitals, and some chapels and churches belonging to abbies and priories, which were specially exempted from the visitation of the ordinary, and subject only to that of the pope; and when the jurisdiction of the pope was abolished by st. 25 H. 8, c. 21, the exemption was continued (*d*), and the visitation ordered to be by commission from the King under the great seal.— But by st. 31 H. 8, c. 13, s. 23, all churches and chapels belonging to the monasteries and other religious houses dissolved by that statute, which were exempted from the visitation of the ordinary, were subjected to the visitation of the ordinary of the diocese, or to that of such person or persons as the King should appoint.

BUT the visitation of the ordinary extends only to matters of spiritual concern; he has no jurisdiction as *ordinary* over the temporal interests of a spiritual corporation, or matters affecting its constitution. The bishop, however, is frequently the *temporal* as well as *spiritual* visitor of the dean and chapter: but he has not the former character as bishop, as he has the latter (*e*).—And where there is no

(*a*) 2 Rol. Abr. 229, 230, 231. 10 Co. 31.

(*b*) Co. Lit. 344, a. (*c*) Co. Lit. 96, a. 344, a. (*d*) S. 20.

(*e*). Vid. Rex v. Bishop of Chester, 1 Will. 206. Bishop of Chichester v. Harwood, 1 Term Rep. 650.

visitor expressly appointed over a spiritual corporation, the jurisdiction is in the King's Bench (*a*).

THE right of appointing a visitor to an eleemosynary corporation, as well as of prescribing statutes to it, is in the founder, whether the King or a subject (*b*); and if no visitor be appointed, the founder and his heirs are visitors by the common law; and by 39 El. c. 5, which gives permission to incorporate workhouses for the poor by deed inrolled, it is enacted, "that they shall be governed and visited by such person or persons, bodies politic or corporate, their heirs, successors, or assigns, as shall be nominated or assigned by the founder or founders, their heirs or assigns, according to such rules, statutes, and ordinances as shall be established by the founder or founders, his or their heirs or assigns, in writing under his or their hand and seals" (*c*).

IN the reign of Henry the fifth, the property of many hospitals having been wasted or misapplied, a statute (*d*) was made by which the ORDINARIES, by virtue of the King's commission, were commanded to inquire into the manner of the foundation of such hospitals as were of the foundation and patronage of the King, and of the state and government of them, and certify their inquiries into Chancery; with respect to other hospitals of the foundation and patronage of subjects, they were to make the same inquiries, and correct and reform the abuses, according to the laws of holy church.—This statute, it is evident, gave only a temporary authority to the ordinaries, and consequently, after the expiration of their commission,

(*a*) *Rex v. Bishop of Chester*, 2 Str. 798.

(*b*) *Vid. supra* the case of *Shirak*, and 4 Mod. 124. 10 Co. 33, 2. 1 Vez. 472: *Vid. vol. 1, 50, 51.*

(*c*) *Vid. vol. 1, 57, 60.*

(*d*) 2 H. 5, c. 1.

the superintendence of the hospitals reverted to the heirs of their respective founders, or visitors appointed by them.

By the 14 El. c. 5, the founder of an hospital, if no visitor was appointed, was to visit during his life, and after his death the bishop of the diocese, or his chancellor.

By the statute 43 El. c. 4, after reciting "that lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money had been theretofore given, limited, appointed, and assigned, as well by the Queen and her predecessors as by others; some for the relief of aged, impotent, and poor people, some for the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and *scholars* in the universities; some for the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; some for the education and preferment of orphans; some *for* or *towards* relief, stock, or maintenance for houses of correction; some for the marriage of poor maids; some for the supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for the relief or the redemption of prisoners or captives, and for the aid and ease of poor inhabitants concerning the payments of fifteenths, setting out of soldiers, and other taxes:" and complaining "that such lands, &c. had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same:" it was enacted, "that it should and might be lawful for the lord chancellor or keeper of the great seal of England, for the time being, and for the chancellor of the duchy of Lancaster for the time being, for lands within the county palatine of Lancaster, from time to time, to award commissions

missions under the great seal of England, or the seal of the county palatine, as the case should require, into all or any part or parts of the realm respectively, according to their several jurisdictions, to the bishop of every several diocese and his chancellor, in case there should be any bishop of the diocese at the time of awarding the commission, and to other persons of *good and sound behaviour*, authorising them, or any four or more of them, to enquire, as well by the oaths of twelve lawful men or more of the county, as *by all other good and lawful ways and means*, of all and singular such gifts, limitations, assignments and appointments *aforesaid*, and of the abuses, breaches of trusts, negligences, misemployments, *not* employing, concealing, defrauding, misconverting, or misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money *theretofore* given, limited, appointed, or assigned, or which should *thereafter* be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed; and that after the said commissioners, or any four or more of them, on calling the parties interested in any such lands, tenements, &c. should make enquiry by the oaths of twelve men or more of the said county, to whom the said parties interested should and might have and take their lawful challenge and challenges; and on such enquiry, hearing, and examination, set down such orders, judgments, and decrees, that the said lands, tenements, rents, annuities, profits, goods, chattels, money, and stocks of money, might be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned, or appointed by the donors and founders; which orders, judgments, and decrees, *not being contrary or repugnant to the orders, statutes, or decrees*

of the donors or founders, should stand firm and be good, and should be executed accordingly, until the same should be undone or altered by the lord chancellor of England, or lord keeper of the great seal, or the chancellor of the county palatine of Lancaster respectively, within their several jurisdictions, on the complaint of any party grieved."

By s. 8, all orders, judgments, and decrees of the commissioners, or of any four or more of them, are to be certified under the seals of the said commissioners, or of any four or more of them, into the court of Chancery of England, or of the county palatine respectively, within the time limited in the commission,

By s. 9, the lord chancellor or lord keeper, and the chancellor of the duchy, are to take such order respectively for the due execution of the decrees of the commissioners, as to either of them shall seem fit and convenient.

AND by s. 10, any person who shall find himself grieved by any of the orders or decrees may, after the certificate, complain to the lord chancellor, or lord keeper, or the chancellor of the duchy respectively, who, according to their several jurisdictions, may, *by such course as to their wisdom shall seem meetest*, the circumstances of the case considered, proceed to the examination, hearing, and determination of such complaint; and may annul, diminish, alter, or enlarge the orders or decrees, consistently with equity and good conscience, according to the true intent and meaning of the donors and founders.

BUT it is provided that this act shall not extend to lands, &c. given to any college, hall, or house of learning within the universities, or to the colleges of Westminster, Eton, or Winchester, or to any cathedral or collegiate church; and that it shall not extend to any city or town corporate,

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or to any lands or tenements given to the uses mentioned in the former part of the statute within such city or town corporate, where there is a special governor or governors appointed to govern or direct such lands, &c. nor to any college, hospital, or free school, which have special visitors or governors, or overseers, appointed them by their founders.

It is likewise provided, that this act shall not be prejudicial to the jurisdiction or power of the ordinary.

THE proviso, with respect to cities and towns corporate, extends to a gift to a corporation, to be employed in *another* corporation, or to be employed by the mayor in the *same* corporation: and to a gift to an hospital in reputation, which has a governor; as to the poor knights of Windsor, for the dean and canons of Windsor are their governors, appointed by the founder (*a*).

BUT the proviso does not extend to a gift to a corporation not in existence at the time of the act, nor to a gift made, *since* the act, to a corporation which was then in existence: nor to *goods* given to a corporation, for it speaks only of lands and tenements; nor to a gift to a corporation, which is not to be employed in that or any other corporation (*b*): nor to a gift made to the governors or trustees of a school, to be laid out on an object not connected with the purpose of their institution,

THUS, where lands were given to the governors of Harrow school, as trustees, on trust to employ all the profits yearly towards repairing and amending the common highway, from Edgware to London, when, and as often, and in such manner as they should think fit; and that, if it should afterwards happen, that the highway from Edgware to London should be sufficiently amended, or

(*a*) Duke's Caritable Uses, 172.

(*b*) Id. *ibid.*

should

should not require the whole profits to be laid out on it, then they should lay out on the road from *Harrow* to London, the whole, or so much as should remain after repairing the other road: an information being filed, by the attorney general, against the governors, on the ground that they had expended those profits on the Harrow, which should have been all laid out on the Edgeware road; it was objected, on behalf of the defendants, that the court had no jurisdiction, because, where no special visitor was appointed, the visitatorial power resulted to the heir of the founder; and therefore, though no special visitor was here appointed, this case came within the proviso of the statute, and no commission could issue; and it was only in the case where a commission could issue, that the court of chancery had jurisdiction.—The lord chancellor (*a*) admitted, that the true construction of the proviso was, that where a college, hospital, or school was founded, and a special visitor was appointed, or there was a visitor by operation of law, the commission, by virtue of that statute, should not interpose; and that, therefore, if this information had been for the revenue of the *school*, the objection to the jurisdiction might have applied; but this, he observed, was a distinct charity from the school, a collateral trust with which the visitor, if there was one, had nothing to do; and therefore was properly within the jurisdiction of the court (*b*).

WHERE no specific provision is made for the regulation and management of a charity, the court of chancery, by virtue of its general jurisdiction, takes cognizance of it, by information, in the name of the attorney general, and since this statute, by commission in all cases within the ge-

(*a*) Hardwicke.

(*b*) Attorney gen. v. governors of Harrow school, 2 Ves. 551.

neral purview of the statute, and not coming within the exception of the proviso. But where there is a charter, giving proper powers, the charity must be regulated in the manner in which the charter has pointed out; and where there is a local visitor the court of chancery has no jurisdiction over any object within the cognizance of the visitor (*a*).

WHERE the persons, for whose benefit a charity is established, are not themselves incorporated, but trustees or governors are appointed, as in the case of Sutton's hospital (*b*), the governors have a kind of visitatorial power with respect to the objects of the charity; but where no visitor is expressly appointed, and the legal estate of the endowment is vested in the governors, the latter, as to the management of the revenues, are subject to the jurisdiction of the court of Chancery.

THE free grammar school of Birmingham was founded by King Edward the 6th, who endowed it, and by letters patent appointed perpetual governors with power to make laws and ordinances for the better government of the school; but by the letters patent no express visitor was appointed, and the legal estate of the endowment was vested in these governors.

A COMMISSION having issued, under the great seal, to inspect the management of the governors, it was objected, that the King having appointed governors, had, by implication, made them visitors, the consequence of which was, that according to the express words of Lord Coke, in the case of Sutton's hospital, the crown could not issue a commission to visit or inspect the conduct of those governors.

(*a*) 3 Atk. 108. Attorney gen. v. Price, 2 Vef. 328, 329. Attorney gen. v. Middleton.

(*b*) 10 Co. 31 a, vid. vol. 1, 54, 55.

THE matter was first heard by Lord Chancellor Maclesfield, and afterwards by Lord King, who desired the assistance of Lord Chief Justice Eyre, and Lord Chief Baron Gilbert, and all three agreed, that the commission was good; they conceived it to be unreasonable and of mischievous consequence, that where governors were appointed, these, by construction of law, should be visitors, and should have an absolute power, and remain exempt from visitation themselves. They therefore held, that in those cases, in which the governors or visitors were said *not to be accountable*, it must be intended to be confined to those cases where the governors have the power of government only, and not where they have the legal estate, and are intrusted with the receipt of the rents and profits; because it would be of the most pernicious consequence, that a person, entrusted with the receipt of rents and profits, especially for a charity, should not be accountable, however he might misemploy them. They held further, that the word "governor" did not of itself imply "visitor," and that such a construction was against the common and natural meaning of the word, and instead of being for the benefit, was to the great prejudice of the charity (a).

IN the case of Harrow school, before mentioned (b), the lord chancellor admitted, that the governors were not *necessarily* visitors, and consequently; that they might be subject to the jurisdiction either of a visitor or of the court of Chancery with respect to the revenues, though they might be absolute with respect to the government of the school.

BY the constitution of Magdalen college, on Blackheath, under the will of Sir John Morden (c), the trustees, and the

(a) Eden v. Foster, 2 P. Wms. 325.

(b) P. 185.

(c) I find myself under the necessity of remarking, that if Lord Hardwicke was the great man he is generally considered to have been, he

the survivors of them, were to have a power to place and displace the chaplain, treasurer, and other officers, at their will and pleasure, and to make bye laws and rules for the regulation of the charity, and for the government and conduct of the house. After conferring on them this power, the testator directed, "that the said governors *should* and *might* visit the said college once a year, or oftener, if they thought fit: at which time they were to inspect the treasurer's accounts, and also to examine into the behaviour of the chaplain, &c. and if they found they had acted dishonestly and improperly, to displace them, and put other persons in their room: and likewise, if they found any merchants immoral, guilty of drunkenness, &c. they *should* and *might* remove them."

ON a petition presented to the Lord Chancellor Hardwicke, in the name of the attorney general, at the relation of one Gray and others, on behalf of the charity, against Sir John Lock and others, trustees, his lordship is made to express himself thus: "At present the question is, whether I should be warranted on such an application as this, to take a previous step to restore these persons to their places in the college. It is incumbent on this court to support the charity. It is likewise incumbent on it to maintain and guard the power of those who have that authority from the donor. For it would be of bad conse-

he was very unfortunate in not having his decisions reported by men of accuracy and precision. In Atkins and Vesey, there is hardly ever a state of the facts given to render the arguments of the counsel and the judgment of his lordship intelligible. The reader is left to collect, from the allusions of each, such an imperfect state of the case as he can, and frequently to supply, from conjecture, something to render it consistent with itself; and his lordship's judgment is generally reported in a manner so confused, and in language so vague and incorrect, that it is difficult to establish upon it any general principle,

quence

quence to the charity, if the authority of persons intrusted with the management of it, were, *upon every instance, to be enervated and broken into:*

“If there were to be the same niceties observed on the amotion of some pensioners of an hospital, as if they had turned out a person from a freehold, no man of fortune or abilities would undertake such a trust. Sir John Morden has not left the power of visiting to his heir, *but has made a perfect constitution of this charity.* Now this is very material to the first and great question, the authority of the trustees.

“I AGREE, that where there are governors who are visitors likewise, so far as relates to the estates of this charity, they are subject and accountable to this court. There are two sorts of authorities here: one as to the management of the estate and revenue; the other as to the management and government of the house: in the latter they are absolute, and not controulable by this court.— As to the question, whether they have an arbitrary power to remove at pleasure, I will give no absolute opinion, but am inclined to think they have such a power of removing, without hearing, or giving any reason for so doing. My reasons are these: by the constitution of this charity, they have a power of removing the chaplain, treasurer, and other officers, at their will and pleasure. If it had rested there, there is no doubt but they *might* have done it; but it is insisted, by the attorney general, that there is another clause restraining them. But I think the latter clause is not a restraining clause, nor gives them less power, but only lays an injunction or obligation upon them to remove for such general offences, and leaves them, in every instance besides, to act at their discretion. But afterwards, in their general local visitation, they are to call the treasurer to

to account. This they might have done by virtue of their being governors, and therefore it is an injunction upon them to inspect the treasurer's accounts, &c. Are they to remove the officers and servants for any offence that must be supported in a court of justice, with the same legal nicety as in the case of a freehold? Is the chaplain or treasurer an officer for life? They would, if so, be equally restrained from removing them as the merchants themselves. As to the merchants, if guilty of drunkenness or any debauchery, then they *shall* and *may*, by writing under hand and seal, turn them out.

“THE words *shall* and *may*, in general acts of parliament, or in private constitutions, are to be construed imperatively: they *must* remove them. On the whole of this point, I am of opinion, that there is a general power of amotion, but, as I said before, the founder has laid an obligation on them to turn them out for the *majora crimina*, if I may so call them.——The great difficulty with me, is, the danger of making a precedent of restoring a mere pensioner of an hospital, on the application of the pensioner himself. Consider what number of great hospitals there are in this kingdom, and how bad the consequence would be for me to examine too nicely into these *amotions*, as if the *freehold* of a person were in question. The governors of these hospitals every day turn out and put in, and there would be no end of such enquiries were I to interfere” (a).

ON the petition of two persons, of the names of Heath and Gilpin, the latter being rector of Howton, Queen Elizabeth granted a charter for founding a free school and alms-house: governors were appointed with a power to appoint and remove the master and usher of the school, and to do every other matter necessary and expedient for the

(a) 3 Atk. 164, 165.

scholars; and a power was reserved to the heirs of Heath and the successors of Gilpin, as rector of Howton, to appoint governors from time to time, and to remove those governors as often as found convenient.

AN information, in the name of the attorney general, having been filed against the master and governors, on the principle of the court of Chancery having the general superintendency of all charitable donations and trusts; the principal question was, whether, on the supposition that there existed a just ground of complaint, this was a proper case for the general jurisdiction of the court, or whether there were not proper visitors to take cognisance of it.

THE lord chancellor (a) said, that, from the nature of this foundation, he thought the application to the jurisdiction of the court of Chancery, was improper, and that recourse should have been had to another method of proceeding to rectify what was wrong in the exercise of the power given over this charity; this foundation, he observed, had been made at the petition of two private persons, by charter from the crown, which distinguished this from cases on the statute of charitable uses, or cases before that statute, in which the court exercised jurisdiction over *charities at large* (b): over these, the King had a general jurisdiction, because there must be somewhere a power to regulate; but where there was a charter, with proper powers, there was no ground to come into this court to establish a charity; and it must be left to be regulated in the manner in which the charter had directed, or by the original rule of the law. Though, therefore, he had often heard it said, in this court, "that where an information

(a) Hardwicke.

(b) By charities at large, his lordship means charities without an incorporation, or not established by charter.

was brought to establish a charity, praying a *particular* relief, in which the party failed, yet the information was not to be dismissed, but there must be a decree for the establishment;” this was to be understood as applying only to charities at large, or *charities in their nature before the statute of charitable uses (a)*, and not to the case of charities incorporated, established by the King’s charter under the great seal.—It had been held, he said, in the case of *Birmingham school*, that the very appointment of governors of an hospital would give the visitatorial power.”—“The result was, that, had the question rested singly on the power given to the governors, he should have been of opinion, that the governors were visitors.” But it had been objected, he said, that here the estate and revenue were vested in the governors, and that then they could not be visitors, because they could not visit themselves. This, he said, was a material objection, and had been so held in the case of *Sutton Colfield (b)*, because they might misapply the revenues; but it had never been held, that the governors could *not* be visitors merely because the legal estate of the charity was vested in them. This resembled almost exactly the case of Sutton’s hospital, in which, as to this point, the leading principle was, that the legal estate of the corporation, being vested in the governors, did not exclude them from the right of governing and visiting; for that none of the money could come to the hands of the governors: though, if they had been to receive the rents and profits, and to apply them, *that might have been of another consideration, and might have excluded them.* In the present case the governors had only the legal estate in them, not receiving the revenue, which the master did, from time to

(a) It seems difficult to attach a precise meaning to the words here put in italics. (b) Duke’s Charitable Uses, 68.

time, and for which he accounted.—In another respect, indeed, this differed from the case of Sutton's hospital, that there was another superintendancy over the governors themselves; and, if *they* were not visitors, the heir of Heath and the successor of Gilpin were certainly visitors, for the power of removing governors included every thing.

On the whole, he was of opinion, that this information was improperly brought in respect of the jurisdiction: “and certainly, he repeated, there were somewhere visitors of this charity; for the proper place to apply to for misbehaviour, would be to the governors; if they refused, it would be a misbehaviour in them; and then application should be made to the rector, &c. to remove them and appoint others.” (a).

If this be an accurate report of Lord Hardwicke's judgment, it proves, that his lordship was mistaken in his recollection, both of the case of Birmingham school, and of that of Sutton's hospital. In the former it was so far from being held, as his lordship is made to say, “that the very appointment of governors of an hospital would give the visitatorial power;” that it is resolved, in express terms, that the word “governor” did not, of itself, imply “visitor” (b).—In the latter, the words of the letters patent are these: “and for the better government of the said hospital, the said Thomas Sutton during his life, and after his decease the said governors, for the time being, or the most part of them, or such and so many of them as the said Thomas Sutton shall, by his writing, under his hand and seal, thereunto assign, appoint, and nominate, shall and may, after the decease of the said Thomas Sutton, have full power and lawful authority, to visit, order and punish,

(a) Attorney gen. v. Middleton, 2 Ves. 327.

(b) Vid. 2 P. W. 327. Ante, p. 188.

place, or displace the master, preacher, schoolmaster, usher, poor people, scholars, members, and officers of the said hospital, and every of them, &c.” (a). On which the words of Lord Coke, in reporting the resolution of the court on this point, are these: “To be visited by the governors, &c. that is explanatory; for in this case, the poor which shall be resident in the house of the charter-house, shall not be incorporated, but certain persons, in whom the possessions are vested, who shall not be resident there, but only have the general government and ordering of the poor therein ——— for if no visitor had been appointed by the charter, the governors should visit” (b). Here Lord Coke has clearly in view, only the superintendence of the conduct of the persons who were the objects of the charity and of the officers of the house; as to which the governors, as governors, are certainly visitors, whether the rents and profits pass through their hands or not.

BUT the proper distinction seems to be this, that when governors are appointed to superintend a charity, they are, in all cases, visitors of the objects of the charity; when the application of the revenues is not immediately intrusted to them, they are also visitors as to the application of the revenues, and the court of Chancery has no jurisdiction over them; but when the management and application of the revenues is immediately intrusted to them, then, as to these, they are subject to the controul of that court.

As eleemosynary corporations are the creatures of the founder, he may delegate the visitatorial power generally or specially; if he appoint a *general* visitor without restraint, as to any particular instance, the person so constituted has all incidental powers. But a person constituted visitor in general terms, may be restrained as to particular

(a) 10 Co. 13, a.

(b) 10 Co. 31, a.

instances. So, the founder may appoint a *special* visitor for a *particular* purpose, and no farther. So, he may make a *general* visitor, and yet appoint an inferior *particular* power, to be executed by another person who will then be *special* visitor. Thus the visitation of the corporation at large may be in one person, and that of one of the members, as of the head, may be in another : and if the founder of a college appoint a visitor of the head specially, the general power of visitation remains in the founder and his heirs. The manner too in which the visitatorial power shall be exercised, whether *general* or *special*, may be prescribed by the founder (*a*).

No particular form of words is necessary for the appointment of either a general or special visitor. "Let the bishop of Ely, for the time being, be visitor," is an appointment of a perpetual and general visitor. But a person may be general or special visitor without such express appointment, and the intention of the founder that he should be so, collected from the statutes. So, from the whole purview of the statutes considered together, must be collected the power which the founder meant to give the visitor (*b*).

THE sentence of a visitor, on subjects within his jurisdiction, is final and conclusive, and the King's courts cannot, in any form of proceeding, review the sentence. Lord Chief Justice Hale is said to have been always of this opinion; and on this principle was decided the case of one Appleford, who applied to the court of King's Bench for a mandamus, commanding the master and fellows of New College, in Oxford, to restore him to a fellowship of which they had deprived him : the mandamus issued ; and they

(*a*) Vid. Fitzg. 108, 307. 3 Atk. 663. 1 Ves. 78. 2 Ves. 328.
1 Bur. 200. (*b*) Vid. the authorities last cited.

returned,

returned, that by the laws of the founder, they might expel any one who had committed an enormous crime; that Appleford had committed an enormous crime, and that, therefore, they expelled him; that he had appealed to the bishop of Winchester, who was visitor of the college, and who confirmed the expulsion; then they concluded to the jurisdiction of the court: this was held a good return, though it did not mention what crime Appleford had committed, so that it might appear to the court, whether he was lawfully expelled or not; for it was held, that the court had no right to interpose, and therefore it was of no use to mention the crime (*a*).

BUT this point was not finally settled till the famous case of Phillips and Bury; which, as it is a leading case on the subject of the visitatorial power, and not very distinctly reported in any one book, the reader will excuse me for giving at some length.

EXETER college, in the university of Oxford, was founded by William Stapleton, in the year to consist of a rector and fellows or scholars; by the name of the rector and scholars of Exeter college, within the university of Oxford: but this house, which was originally a hall, was made a college and body politic and corporate, by Queen Elizabeth, in the eighth year of her reign: the founder gave a body of statutes to the college, by which the bishop of Exeter, for the time being, was appointed general visitor; by one statute, the mode by which the rector should be elected was pointed out, and an oath prescribed to him, on his election, by which, among other things, he was to swear, that he

(*a*) Daniel Appleford's case, 1 Mod. 82. Carth. 92, 93, cites 1 Mod. 82. 1 Lev. 23, 65. 2 Lev. 14. Raym. 56, 94, 100. Sid. 94, 152, 346.

would keep and defend the liberties and privileges of the college; another statute pointed out for what faults and crimes he should be deprived, among which were wasting or alienation of the revenues or goods of the college, adultery, and some other particular acts, and likewise the manner in which he should be removed for these faults, viz. that he should be admonished by the sub-rector, and five senior fellows, quietly to depart, which, if he refused to do within a certain time limited, the sub-rector, with the consent of the major part of the scholars, should write to the bishop, who should hear the accusation, and if he found it true, remove the rector from his place: the statute de *visitatione* runs in this manner, "Liceat Domino Episcopo Exoniæ, quoties per Rectorem, et, in ejus absentiâ, Subrectorem, quatuor alios ex septem maximè senioribus fuerit requisitus, necnon absque requisitione ullâ de quinquennio in quinquennium semel ad dictum collegium per se vel commissarium accedere.

"SI tamen ad *deprivationem* aut inhabilitatem rectoris aut *expulsionem* Scholaris alicujus per Episcopum Exoniensem vel ejus commissarium agatur, tunc ostendantur *ei* detecta (a) quibus si non poterit rationabiliter respondere, et sese super objecta purgare, amoveatur sine appellatione, aut ulteriori remedio dummodo ad *ejus expulsionem* concurrat consensus rectoris et trium de septem maximè senioribus scholaribus tunc in universitate presentibus, sine quorum consensu, irrita sit hujusmodi expulsio et nulla ipso facto——et insuper si contra Rectorem, ad amotionem ab officio per hujusmodi Domini Episcopi Commissarium etiam consentientibus quatuor ex septem maximè senioribus scholaribus procedatur, non negamus ei omnes exceptiones justas,

(a) Qu. whether it ought not to be *objecta* or *defecta*.

apud eundem Dominum Episcopum Exoniensem, dummodo ulterius non appellet."

WITH respect to the time which the visitation should last, the statutes had this clause: "Non excedat ultra duos dies proxime sequentes, aut, ex causis urgentissimis et rarissimis, ultra tres dies, sed triduo transacto, eo ipso, visitatio illa pro terminata et dissoluta habeatur."

IN the college there were some perpetual scholars, and some probationary, whose period of probation was a year; an oath was prescribed to the scholars of each class; that of a probationer, was, that he should not reveal the secrets of the college, or make parties in it, and if he should happen to be expelled the college, that he should renounce all appeals, and should do so in writing, if he should be required so to do at his expulsion. The oath of a perpetual scholar was, to observe the statutes of the college, to do or suffer no damage to the college; to obey his superiors; and, if he should be expelled, to renounce all appeals, &c.

ON the first of June, in the second year of King James, Dr. Bury was chosen rector of the college.

ON the 6th of October, in the first year of King William and Queen Mary, one James Colmer, a fellow of the college, was convicted of incontinency, before Dr. Bury, the rector, the sub-rector, and dean, and five others, of the senior fellows of the college, with the assent of the rector, and for that reason expelled the college.

COLMER appealed to the bishop of Exeter, as visitor, who received the appeal, granted an inhibition to any further proceedings against Colmer, and made an order requiring the rector and fellows to give an account of their proceedings, *sub pænâ juris et contemptus*. This order was served upon the rector and fellows, and then the rector sent

a submissive letter to the bishop, and no farther proceedings were had for some months.

THE bishop commissioned Dr. Masters to determine this appeal, for which purpose a citation was fixed on the chapel door of the college, requiring the rector, &c. to appear on Saturday, March 23d, 1688—9, or 1689—90. The rector appeared accordingly, and tendered a protestation; but the commissary proceeded to give sentence for the restoration of Mr. Colmer.

SOME time after this sentence, the rector and fellows proceeded against Mr. Colmer, as a pretended fellow, for another act of incontinency; he again appealed to the bishop, who received the appeal a second time, and resolving on a visitation in person, sent a *monition*, on the 16th of May, 1690, under his episcopal seal, directed to the said Dr. Bury, then rector, and to the sub-rector of the college, requiring them to appear, on the 16th of June, next following, before the bishop or his commissary, in the chapel of the college: on the said 16th of June, the bishop went to the college in order to visit it, and went to the chapel of the college, but found the chapel doors shut against him. The rector and scholars, in the court of the college, offered to deliver to the visitor, a protestation under the college seal, in which they set forth, as a reason for not obeying the citation, the bishop's having visited in the February before, by Dr. Masters: the visitor refused to accept the protestation, and one Francis Webber being sworn, declared on oath, that the citation was read in the chapel of the college before the coming of the bishop. The bishop caused the names of the rector and scholars to be called over, but they did not appear; the porter being called, and not appearing, the visitor departed without doing

ing any thing further: on the first of July, 1690, the visitor, by a certain other writing, sealed with his seal, cited the rector and scholars by name, to appear before him in the common hall of the college, on the 24th of July, then next following, of which the rector and scholars had notice, and protested, by a certain writing under their common seal, against the intended visitation. The protestation, as before, set forth the statute de *visitatione*, by which the visitor was to visit *de quinquennio in quinquennium*, then shewed that he visited by his commissary, Dr. Masters, in March; that five years were not since elapsed, and that they were sworn to preserve the statutes and privileges of the college; giving these as their reasons, why they could not submit to the visitation. The visitor, however, proceeded in his visitation, on Thursday the 24th of July; Dr. Bury, and several of the scholars, being summoned, did not appear; on which the visitor called for the oath of the apparitor of the 16th of June, and ordered it to be registered as an act: then he adjourned the visitation till Friday the 25th, and on that day's meeting did several visitatorial acts, and, in particular, suspended George Verman, John Hiern, Thomas Lethbridge, Benjamin Arches, and several other fellows for their contumacy in not appearing; then he adjourned till Saturday the 26th of July, when, by the consent of four of the senior fellows of the college, then present in the university, and not suspended, he deprived the rector: but four of the assenting fellows were not four of the seven seniors; unless by the expulsion of Dr. Hiern, who had a college living, which was thought incompatible with his fellowship, and the suspension of four others their seniors.

AFTER

AFTER this sentence William Painter was chosen rector, "concurrentibus iis qui in jure requiruntur."

ON this case an ejectment was brought by one Phillips for the rector's house, on the demise of Painter, against Dr. Bury.—The defendant pleaded specially, that the house in question was the freehold of the rector and scholars, but said that *he* was then rector of the college, and that in right of the rector and scholars he entered and ejected the plaintiff; without this, that the lessor of the plaintiff, at the time when the lease in the declaration mentioned was made, was rector of the college.

THE plaintiff replied, that the messuage belonged to the rector and scholars, but that the lessor was rector, and not the defendant, at the time of the lease: on this they were at issue, on which a special verdict was found, stating the facts before set forth: and the general question was, whether, under all the circumstances, Painter was, at the time of the demise, rector of Exeter college, or not, which depended on the validity of the deprivation of Dr. Bury.

BY the opinion of three of the judges, Sir Samuel Eyre, Sir Giles Eyre, and Sir William Gregory, against the opinion of Lord C. J. Holt, the deprivation was held to be void, and judgment given in favour of the defendant, which however was afterwards reversed in a writ of error in the House of Lords.

IN the arguing of this case two principal questions were agitated: first, whether the validity of the sentence of deprivation was examinable in a collateral action in the courts of common law? And, secondly, if it was, whether, in the present instance, the bishop had power to give such a sentence?

IN the course of the argument, every one of the three judges used expressions, from which it might have been concluded,

cluded, that they admitted the sentence of the visitor could not be examined by the courts of common law, in cases which clearly fell within his jurisdiction.

SIR Samuel Eyre is reported (a) to have said, "if, by what is found, it appears to us that the visitor acted *extra-judicially*, and has done *wrong* in depriving the rector; certainly we are not to intend that he has done *right*." From this it might be fairly implied, that if he had thought the case came within the visitor's jurisdiction, he would have thought the sentence could not be examined in the present action.

SIR Giles Eyre expressly says (b), "though, where the visitor has a power, the sentence shall not be examined here, yet when he has not any authority, it shall be examined."

SIR William Gregory admits (c), "that in the case of a visitor, the law will not question his acts done according to his power, which is the reason why this court (B. R.) denies deprived or expelled fellows a mandamus to restore them to their places."

NOTWITHSTANDING these seeming admissions, however, the whole scope of their arguments is to establish the proposition, that in a *collateral* action, the sentence of the visitor may be examined and set aside, even in cases which fall clearly within his jurisdiction: and, in the present case, they are not satisfied with deciding that the visitor had assumed a jurisdiction which did not belong to him, but as if, for the sake of argument, they had admitted the present to be a case clearly within his consueance, they proceed to shew that his sentence was unjust.

(a) Skinner, 455.

(b) Skinner, 468.

(c) Skinner, 471.

THE Chief Justice did not go the length of contending, that the *proceedings* of a visitor should in *no* case be examined; but that where it appeared from the facts stated to the court, that the case in which he had pronounced sentence was within his jurisdiction, that *sentence* ought not to be examined, either as to the *truth* of the facts on which it was founded, or as to its equity as founded on those facts supposing them to be true.

THROUGH the whole of his argument he took it for granted, that the court might examine into the *proceedings* of the visitor, to see whether what he had done was within his jurisdiction; and if he had thought that in the present case, the visitor had *no* jurisdiction, he would have concurred with the rest of the court in pronouncing the sentence invalid.

HE examined, with the same minuteness as the other judges, all the statutes and all the *proceedings* of the visitor; but drew a different conclusion: his idea of the *extent* of a visitor's power by the common law, differed essentially from theirs: *they* asserted that the whole power of the visitor is derived from the founder, and may be controuled and limited by his statutes, and that, in the present case, from the true construction of the statutes, his power was limited, and he had deprived Dr. Bury in direct contravention of them.

THE Chief Justice, admitting that the visitor's power may be limited and controuled by the statutes, contended that he had a general inherent power by the common law, which, by the true construction of the statutes in the present case, was not in fact restrained by them; that the case was clearly within the jurisdiction of the visitor, and his *sentence* ought not therefore to be examined.

WITH

WITH respect to the power of the visitor, the three judges contended, that it was a limited power by private statutes (*a*), and not such a general power as that of the known ecclesiastical courts; that he had no greater authority or power (*b*) than the founder gave him: he was the founder's creature, and received his being, power, and authority from him, and if the founder gave him authority in some things and some cases and not in others, and qualified and limited that power which he gave him, the visitor could not exceed that power and authority which was given him: and that the founder might (*c*) thus restrain the powers of the visitor was plain; for he who gives a power and jurisdiction newly created, might modify and limit that power and jurisdiction as he pleased; and it must be expounded as nearly to this intention as possible, and executed according to what was plainly expressed, otherwise whatever was done would be void, and the power not pursued (*d*).—In short, they reduced the visitatorial power to a mere authority, and cited a number of cases (*e*) to shew with what strictness the law requires a bare authority to be executed.

WITH respect to the power of the court to examine and correct the sentence of the visitor, they endeavoured to distinguish between the case of a *mandamus* and a collateral action: they admitted that the cases which had been decided on *mandamus* were good law (*f*): but they said, that in these, the whole matter was shewn in the return, which was not controvertible, but that it being set forth that there was a visitor who had authority to determine,

(*a*) Skin. 471.

(*b*) Ibid. 454.

(*c*) Ibid. 463, 464.

(*d*) Vid. *Ld. Raym.* 7.

(*e*) *Skinner*, 464.

(*f*) *Id.* 454, 468, 471.

that

that was final, and the court bound by it, but that here the matter being found by the jury, and left to the judgment of the court, they ought to adjudge his sentence to be void, if it was not according to the statutes: they distinguished this case too from the ordinary cases on mandamus, observing that here the first sentence was by the visitor himself, from whom there was no appeal to a superior tribunal.

THEY insisted on the general power which the court of King's Bench possessed (a) of not only correcting errors in *judicial* proceedings, but also of rectifying *extrajudicial* proceedings which tended to the oppression of the subject; they said, that where any jurisdiction was restrained as to time and place, or persons, and other particular circumstances, and it exceeded and transgressed its limits, this court had power to interpose and keep it within its limits: that it was a general principle, that where a man had a wrong done to him, the law had provided some remedy for him: that the policy of the law had not trusted any of the courts of justice originally with the final determination of matters of law, but had appointed writs of error and appeals to correct the errors of inferior tribunals: that no man could erect a jurisdiction of which the decisions should not be subject to examination, any more than he could appoint by his will, that if any difference should arise on the construction of it, that should be determined by J. S. and that his determination should be final: and that the law should put such a power in the visitor of a college, that he should do what he pleased; that whatever he did should be like the laws of the Medes and Persians, *unalterable and unquestionable*; and that when such a case came

(a) Skin. 454, 471.

before the court, they should be precluded from giving a remedy, seemed strange and improbable.

THEY distinguished this case from those which belong properly to the jurisdiction of the ecclesiastical courts; in the latter they admitted the sentence was final, and the proceedings not examinable directly, but by appeal or commission of review, for that the courts of common law gave credit to the sentence of the ecclesiastical courts in causes of which they had conuſance: but this was the case of a lay corporation not *subject* to the jurisdiction of the ecclesiastical courts; that no *appeal* lay from the sentence of the visitor, and that of necessity, it was examinable in a collateral action, for otherwise the party injured would be without remedy: and Sir S. Eyre cited the case of Dr. Cove-ney, in Dyer (*a*), who says, "that this being a temporal matter, the party wronged shall have an assize, or some such suit, at common law:" from whence, he said, it was strongly implied, that there could be no case where a man should have a wrong done to him in a temporal matter, without having a remedy provided by the law: but Sir Giles Eyre said that he could not have an assize, because he was but one part of the body, and not capable to maintain an assize in his own name; for which he cited 8 Aff. 29. 13 Rep. 70, and 11 Rep. 99: from whence he inferred the more strongly, that the sentence of the visitor must of necessity be examined in a collateral action.—They further observed, that even in cases which were purely and properly of ecclesiastical jurisdiction, though the temporal courts could not directly interfere, yet if a title to land came to be tried, in which those matters accidentally occurred, they were to be judged of and tried in the temporal court.

(a) Dyer, 209.

THIS latter observation, however, does not seem applicable to the case under discussion.—The questions of ecclesiastical jurisdiction which may be determined by the temporal court, are such only as accidentally occur in the progress of the cause; but the validity of the visitor's sentence here was not an incidental point, but the sole question, to determine which the ejectment was brought.

IN examining whether the visitor had acted within his authority, they made it a principal point, that by the statute *de visitatione*, he was not enabled to make a visitation on the 24th of July.

THEY all insisted that, by the words of the statute, he had power to make a visitation only in two cases; the one when he should be requested by the rector, sub-rector, and scholars; and the other without a request, *ex officio*, from five years to five years: that if he had at any time visited *ex officio*, he could not make a second visitation without request, till the expiration of five years; it was not pretended that there was here any visitation by request; and to shew that the visitation of the 24th of July was premature, Sir Samuel Eyre (a) was of opinion that the commission to Dr. Masters to hear the appeal of Mr. Colmer, and his acting under that commission, was a quinquennial visitation: first, because it was not a visitation by request, but so much the contrary, that the rector and scholars protested against it; secondly, because it must be understood, that whatever the founder had directed to be observed under the sanction of an oath, he intended should be considered as part of his statutes; by the oath of the rector, he was to be faithful to the college, and to preserve their possessions, their rights, and their liberties, to the utmost of his power: by the oath of the scholar, in *annum probationis*,

(a) Skin. 458.

he was not to reveal the secrets of the college, or to make parties in it; and if he should happen to be expelled the college, to renounce all appeals: by the oath of a perpetual scholar, beside other things, he also was to renounce all appeals: so that the statutes allowed no appeals to the visitor for a scholar deprived. He did not doubt, indeed, but that the visitor in his visitation, whether it was by request or not, might have examined this matter of Colmer; for his authority reached to interrogate about the state of the college and all its members; but still this must be in his *visitation*, and there was not a word in all the statutes that gave him power to hear appeals, or to examine miscarriages, otherwise than in a visitation; and for these reasons he concluded Dr. Masters's commission must be a visitation, and if so, the visitation of the 24th of July was premature, and every act done in it absolutely void.

THE coming of the bishop on the 16th of June in the same year, he also considered as a visitation; for he had done a visitatorial act in examining Webber, the apparitor, about the citation; and he thought there was no doubt, but that if the visitor came to interrogate, though he made no decree, it was a visitation, and he had himself afterwards entered it as a visitatorial act: this visitation, it was confessed, was not by request; it must therefore be considered as a quinquennial visitation; and if so, it was before the time, and therefore void.

THE visitation in July was not found to have been by request; it was therefore a voluntary visitation, and made a third quinquennial visitation within six months: and by the statutes of the college, if that of the 13th of March, or the other of the 16th of June was a visitation, this in July must be *extrajudicial*, and consequently every thing done then must be void.

BOTH Sir Giles Eyre and Sir William Gregory admitted that the coming of Dr. Masters on the commission in March could not be considered as a visitation; because, though the scholar by his oath was to make no appeal, yet the doctor's commission was only to hear an appeal in a particular case, and he could meddle with nothing else.

GREGORY thought, that, under all the circumstances as found, the coming of the bishop on the 16th of June was a visitation: he had issued a citation or monition, requiring the rector and scholars to appear before him and submit to his visitation; when he came he had made public proclamation for their appearance, called over their names, and administered an oath to the person that served the citation, of its being duly served. These were acts which he could not do as a private person, but only as a visitor; and he might have adjourned the visitation from the chapel into the hall, and there have perfected the visitation.

THE visitor himself had shewn that he considered these acts as amounting to a visitation; for, otherwise, why had he in July called for the proceedings of that day, and had them registered as an act before him? Were extrajudicial proceedings to be called acts of court? If then the acts done the 16th of June were done in the character of visitor, either these constituted a visitation of themselves, or that day was the first day of a visitation, which was continued in July.

SIR Giles Eyre was so far from thinking that what was done on the 16th of June amounted of itself to a visitation, that he thought, that if nothing had been connected with it afterwards, it could not have been considered even as the beginning of a visitation. But he considered the visitor's calling for the oath of the apparitor and causing it to be registered

registered as an act on the 24th of July, as a continuation of what was done on the 16th of June, so that the visitation began the 16th of June, and was continued through the 24th, 25th, and 26th of July, on which last day was the deprivation of Dr. Bury.

IN this view of the case, he agreed with Sir William Gregory in his reasoning on the latter part of the alternative put by him; and contended that the deprivation of Dr. Bury was void, the visitation, by the construction of the statute de visitatione, being determined before the day on which the deprivation took place: for that statute had empowered the visitor to hold his visitation but for two days, unless *ex causis urgentissimis et rarissimis*; and then it was not by any means to be prolonged beyond three days, and every thing done after the three days was void.

BUT admitting that the visitation in July was a regular *quinquennial* visitation, the three judges concurred in opinion, that in the manner of depriving the rector, the visitor had gone beyond his power; for that it was never the meaning of the founder, as appeared by the statute, that he alone should have the power of depriving the rector, but that he must have the consent of four of the senior fellows of the college.

IT had indeed been argued, that this consent was only necessary to the expulsion of the fellows, because the clause in the statute "*dummodo ad ejus expulsionem concurrat consensus rectoris et trium de septem maxime senioribus, &c. sine quorum consensu, irrita sit hujusmodi expulsio, &c.*" could not apply to the expulsion of the rector, as it could never be presumed that he would consent to his own deprivation: but in answer to this they said, that taking the whole statute together, though ambiguously penned, it must be understood, that if the visitor or his

commiffary proceeded to the removal of the rector, he ought to have the consent of four of the senior fellows of the college; the words *privatio*, *expulfio*, *amotio*, though differing in found, yet fignified the fame thing, being ufed in the ftatutes as fynonymous; and the fair conftruction of the whole ftatute was, that if the *rector* were to be deprived for any of the crimes enumerated in the ftatute, there muft be the consent of *four* of the senior fellows; if a *scholar* were to be expelled, there muft be the consent of the rector and *three* of the seniors; by which expofition, and by no other, the ftatute was confiftent with itfelf.

BESIDES, they faid, from the whole tenour of the ftatute, it appeared, the founder intended to the rector a greater advantage againft amotion or deprivation than to the fcholars; it gave him an appeal from the commiffary to the bifhop, if he was deprived by the former, even with the consent of the four seniors; fhould he then be put in a worfe condition than any of the fcholars were by the founder's ftatutes, by being deprived without the consent of any one, when any of them could not by the exprefs letter of the ftatute be expelled without the consent of the rector and three senior fellows? The vifitor himfelf, to whom the founder had given the power of explaining the ftatutes, had fhewn that he conceived this to be the meaning of the ftatute; for he had, in the very fentence of deprivation, exprefsly mentioned it to be with the consent of fuch and fuch perfons, being four of the feven senior fellows: but this demonftrated the illegality of Dr. Bury's deprivation; for the jury had exprefsly found, that thefe were not the four senior fellows, unlefs they became fo by the fufpention of the others: it could not be pretended that a fellow fufpended ceafed to be a fellow, becaufe that difability being removed, he wanted no new election or
admission,

admission, but still held the same place he had before, and therefore such a suspension could not amount to an amotion, which alone could make him cease to be a fellow: for want of the concurrence therefore of the four senior fellows, the deprivation was void.

It was void also for another reason; the statute had provided that his crimes should be notified to him before sentence was pronounced on him, and that he should be deprived only for the crimes enumerated. He had had no notification of the crimes imputed to him, and he was deprived, not for any crime mentioned in the statutes, but for contumacy: and what was the contumacy? Not complying with the visitation in July. The rector and the fellows had offered their reasons to the bishop for not submitting to it as a visitation; they had alleged, that by their oaths they were bound to observe the statutes, which confined the visitation to once in five years; that five years had not yet elapsed since what they conceived to be a former visitation, and they protested against the visitation, lest any thing should be done to the prejudice of the rights of the college; instead of being guilty of any crime, the rector appeared to have acted conscientiously as an honest man; he had conceived himself to be bound by his oath to resist the visitation; yet this was the contumacy for which he was deprived: an oath was a sacred thing, which a man ought to be cautious not to violate, and it was arbitrary and oppressive to punish him for his scruples.

For these reasons, the three judges concurred in thinking that the deprivation of Dr. Bury was void, and consequently in giving judgment in his favour.

THE Chief Justice made two general questions:—

FIRST, Whether, by the constitution of the college, the bishop of Exeter had power to give a sentence?

P 3

SECONDLY,

SECONDLY, Supposing he had such a power, whether the *justice* of the sentence was examinable in this court in this action?

HE agreed, that, by the statute de visitatione, the bishop could make his visitation but once in five years, unless he were called by the request of the college, and that, if he came, without request, within the five years, his visitation would be void, and if he gave then any sentence, it would be a mere nullity; but he held, that the visitation on the 24th of July was a good visitation, and consequently the sentence given in it, good.

HE could see no colour for considering the coming of Dr. Masters, in March, to examine Colmer's appeal, as a visitation: it was a commission on a particular complaint, made by a single expelled fellow, for a particular wrong supposed to be done to him: but though a visitor were restrained, by the constitutions of the college, from visiting *ex officio*, but once in five years, yet as visitor, he had a constant standing authority, at all times to hear the complaints and redress the grievances of the particular members; it was the proper office of a visitor, to relieve and determine all differences between the members, as appeared, he said, from Littleton, sec. 136; visiting was *one act* in which he was limited as to time; but hearing appeals, and redressing grievances, were the appropriate business of this office: this was the case with all the bishops in England; they could *visit* by the law, but once in three years; but their courts were always open to hear complaints and determine appeals: so that, though the bishop, in the present case, could visit but once in five years, unless upon request; yet he had a power and authority to hear any difference between the members, and redress any particular injury at any time,

WITH

WITH respect to what was done the 26th of June, there could be no question but he intended to visit then; he went for the express purpose of holding a visitation, but they would not permit him to enter the chapel, where he had appointed it to be held: it was, therefore, the strangest construction of this act, to consider it as a visitation; he did nothing but call over the names, which it was proper he should, to see who it was that hindered him from visiting.

BUT it was said, that though he only administered an oath at that time, he afterwards made an act of it, by registering it in July, by which he *tacked* the visitation in June to that in July, and then the visitation continued much longer than the statutes of the college permitted: he said, he made quite a different construction of this: when the visitor, being hindered in June, made an act of this at his visitation in July, that was only with a view of calling them to an account for their contumacy; it was no more than taking an affidavit of the service of the citation: but he had appointed another visitation to be held in the hall; did that alter the case? by no means: it was before *no visitation*, through their obstruction, and that was one thing for which he wished to call them to account; it was the strangest construction, to say, that when the visitor designed his visitation in the chapel, but was prevented by their means, that impediment should amount to a visitation, and it would be extraordinary, if by means of their former contumacy, they should escape from a *true* visitation.

THE next question, he said, was, whether by the true construction of the statute *de privatione*, the consent of the four senior fellows was necessary to the deprivation of the rector; if that was necessary, he admitted, that the

sentence was a nullity, for he agreed, that suspension did not vacate the office of a fellow, and that, therefore, the consent had not been given by those who were actually the four senior fellows of the college at the time of the suspension: but he thought, that, by the true construction of the statute, their consent was not necessary.—First, because by the statutes, the bishop of Exeter was made the ordinary visitor of the college, and he took it to be clear, that where any one was visitor of a college, he had full and ample power to deprive and amove any member, in the quality of visitor.—Secondly, he thought an express power was given to the bishop to proceed to the deprivation of the rector, or the expulsion of a scholar; and this in his visitation.—The statute, he said, used the word *deprivatio* as to the rector, and *expulsio* as to the scholar; and though he agreed that the words, as to real sense, were synonymous, yet, in this statute, he contended, they were differently applied; the clause “if the bishop proceed, &c.” related only to the scholar, because *expulsio*, the word there used, applied only to the removal of a scholar all along; it was impossible it should relate to the rector, for then he must consent to his own deprivation, his consent being there particularly required and mentioned; and it was absurd to suppose he should so consent: in this place, the consent of three of the four senior fellows would not do, without the consent of the rector; this clause could not, therefore, be applied to him.

THE subsequent part of the statute directed, that, if the rector was deprived by the bishop's commissary, though four of the senior fellows consented, he might appeal to the bishop: this was a limitation on the power of the commissary, but there was no qualification of the power of the bishop; he had an express power to proceed to the deprivation

vation of the rector, not only by the general words, by which he was appointed visitor, but by particular words for that purpose, in the very statute; then some words, he said, must be shewn to qualify this power: for his part he could find none; he found some that qualified the power of the commissary, but none that affected that of the bishop.

It had been objected, he said, that it was unreasonable to imagine the founder should give a greater authority to the visitor over the rector, than the scholars.—But the question was not, what was reasonable or proper for the founder to do, but what he had actually done; if, on the perusal of these statutes, it appeared he had given the bishop such an absolute authority, it was not in the power of the court to controul it, for any imagined unreasonableness; he had such an interest in what was of his own creation, and such a controul over it, that he might invest the visitor with any power, that he pleased to give him.—If he had invested him with any uncontrollable authority, it was to be supposed he had some reason for so doing; although, if he had not, it was not material; his will was his reason, in disposing and ordering his own; every man was master of his own charity, to appoint and qualify it, as he pleased. On the whole, it appeared to him, that the consent of the four senior fellows was not necessary to the deprivation of the rector, by the bishop in his visitation.

THE next point, he said, was no more than this, whether, supposing the bishop had an authority to deprive the rector, and he had, in fact, by his sentence, deprived him, the *justice* of the sentence were examinable, in any of the courts of Westminster Hall? This question naturally divided itself into two branches.

FIRST,

FIRST, Whether the sufficiency of the sentence, as to the *cause*, were examinable in the courts of common law?

AND, Secondly, Whether the *truth* of that cause, supposing it to be sufficient to ground the sentence, if true, could be the subject of enquiry there?

ON this question, he was of opinion, that where sentence of deprivation was given by him who was the proper visitor, so created by the founder, or by the law, no enquiry should ever be made into the validity or reasons of the sentence; this would appear if it were considered, on what the authority of the visitor was founded: here he considered the distinction between the two sorts of aggregate corporations; those which were intended for public government, and those for private charity. The latter, he said, being founded and endowed by private persons, were subject to the private government of those who erected them, and therefore, if no visitor were appointed by the founder, the law appointed the founder and his heirs to be visitors: the founder and his heirs were patrons, and were not to be guided by the common known laws and rules of the kingdom; but such corporations, as to their own affairs, were to be governed by the particular laws and constitutions assigned them by the founder.—It had, indeed, been said, that the common law did not appoint a visitation at all; he thought otherwise; the law did, in defect of a particular appointment, make the founder visitor; and it was not at his pleasure whether there should be a visitor or not; but if he was silent, during his own time, the right would descend to his heirs (*a*), so that patronage and visitation were necessary consequents on one another: this visitatorial power was not introduced by any canons or consti-

(*a*) Yelv. 65. 2 Cro. 60. 3 Ed. 3, 70. 8 Aff. 29.

tutions ecclesiastical; it was an appointment of law; it arose from the interest which the founder had in the property assigned to support the charity; and as he was the author of the charity, the law gave him and his heirs a visitatorial power, which was an authority to inspect their actions, and regulate their behaviour as he pleased.

AFTER having pointed out the distinction between the case, where the objects of the founder's charity were incorporated, and that in which they were not, but the management of the property was left to trustees, he proceeded to consider what might further be objected to the admission of the visitor's power, to the extent for which he contended.

It might, he observed, be said, that the visitor had no court; should a man be concluded by the sentence of one who had no court? it was not, he said, at all material whether he had a court or not; the only question was, whether he had a jurisdiction? if he had jurisdiction, and conusance of the matter and of the person; and he gave sentence, that must have some effect to make a vacancy, be it ever so wrong; but there was no appeal if the founder had not thought fit to direct one; that an appeal lay in the common law courts of the kingdom, was certainly not correct; this depended on the government settled by the founder; it was a constitution of his who created it, and therefore if he had directed all to be under the absolute power of the visitor, it must be so; he might have directed that the rector should continue no longer in his place, than the bishop of Exeter should, with an absolute despotic power, determine: he had not, in the present case, gone so far, but he had left it to the wisdom, learning, and integrity of the bishop to judge his cause; and since the founder had confidence

confidence in him, it was not to be presumed that he would act otherwise than he ought.

It was plain, he said, by all the authorities of the books, and by the mode of pleading, that the power of the visitor was such as he described it; if a sentence of deprivation were pleaded, it was not necessary to shew the cause; it was not *traversable*, even in a visitation, when it was by the visitatorial power (a): if this rectory had been a sole college, and not a corporation aggregate of rector and scholars; and Dr. Bury had brought an assize, and this deprivation had been pleaded to it; it would have been a good plea, to shew, that the visitor, for certain causes, had deprived him; and this would not have been *traversable*: for every thing that was *traversable* must be expressed in certainty; and if it was a good plea, and not *traversable*, it was not to be questioned.——It was strange, that pleading a sentence without a cause should be good, and that the finding of a sentence in a special verdict should not be as good, and as conclusive to the party; it was a rule, that things were to be set forth with more exactness in pleading, than in a special verdict; and if, in pleading, it were not *traversable*, the argument was the strongest that could be, that no enquiry could be made into the cause; for if it could, a fairer opportunity must necessarily be given for it in pleading, than on a special verdict, which concluded the parties as to the fact that was found: but all the precedents in pleading, proved, that no cause needed to be shewn.

With respect to there being no appeal from an arbitrary sentence, it must be confessed there was some hardship in this, because the party was concluded by one

(a) Raftall's Ent. f. 1. 11 H. 7, 27, and 7 Co. Kenn's case.

judgment:

judgment: this certainly was severe upon the rector; but it did not lessen the validity of the sentence, nor did it, by any means, prove, that there must necessarily be some way of examining the matter at law in a judicial proceeding.

If the constitution had been, that if the visitor deprived the rector, then it should be in his power to appeal to the archbishop of Canterbury, it would, perhaps, have been more equitable; but in that case, if there had been an appeal, and the sentence had not been reversed, then the deprivation would have been in force, as every one would admit, and irremediable in a court of law; and he did not know any authority that made the sentence the weaker, because it was barred of an appeal.—The case of Cawdry and the high commission court had been mentioned; that was a case in which sentence of deprivation was given against a man, and there was no appeal. In the case of Allen and Nash (*a*) the sentence was found, but no cause for it shewn; yet it was held to be well enough, though no appeal lay, the sentence being in the high commission court. How was this case to be distinguished from the present? it had been said, that that was by virtue of the ecclesiastical law: was it the ecclesiastical law that a man should be concluded by one sentence without an appeal? No! it was because the sentence was given by the high commission court, which had jurisdiction; yet the sentence was not the weaker or more traversable, because there was no appeal.

THE only reason, he could see, for which it was contended the court might enquire and examine this matter, was, that the party was concluded without appeal, for it must be agreed, that if an appeal did lie in the case, it would not be examinable in this court.

(*a*) Jones, 393.

WHERE did the difference lie? it was by the ecclesiastical constitution that these commissioners had their power; but that was established by the law of the land, and so was this power of the visitor; the one derived his authority as much from the law as the others; if then, in the one case, the sentence was conclusive, why, by the same reason, should it not be so in the other? It was so in the case of Bird and Smith (*a*), where a man was deprived for not conforming to the canons; a case certainly very hard; for all the canons were not certainly according to law, nor any of them binding here, further than as they were received and allowed, time out of mind: he then adverted to the cases of Coveney and Baggs (*b*), and pointed out the mistakes on which the assertions in these cases were founded.

He said, he could not conceive, in what the difference lay, between this case, and that of a mandamus: in the case of Appleford, a mandamus was brought to restore him to his fellowship. It was returned, that by the statutes of the college, for misdemeanour, they had power to turn him out, that the bishop of Winchester was visitor, that he was turned out *pro crimine enormi*, and that he had appealed to the bishop, who had confirmed the expulsion, and the particular cause was not returned. I know it well, said his lordship, for I was of counsel for the college, and we omitted the cause in the return for that reason, because we thought it not sufficient. It was strongly urged, that we ought to shew the cause of expulsion in the return, to bring it within the compass of the statute. It was answered, no, there was a local visitor who had given the sentence, and whether it were right or wrong, the party was concluded by it; and the members of the college must submit to such

(*a*) Moore, 781.

(*b*) Vid. ante, p. 178; 179, 207.

laws as the founder was pleased to give them; and Mr. Appleford was not restored: this, continued he, is an express authority to guide us in our judgment in this case; here a local visitor has given a sentence, and thereby actually deprived the rector of his place; and why the law should not be the same when the case appears in a special verdict in an ejectment, as in a return to a *mandamus*, no reason can be given. At this rate we shall always be out at sea, and not know when we shall come to shore. I thought we had come to some certainty since that case of Appleford, that where there is a visitor, and he has power to proceed to deprivation, this court ought to give credit to the justice of his proceedings as much as to those of any judge; and I remember that my Lord Hale took it for clear law, that such a sentence was as strong as a judgment in an assize to bind the party deprived. He is made a judge, and particularly designed by the founder. But he hath his authority from the law, and he is to judge by the statutes. The founder has trusted this particular matter to his discretion, and why shall we suspect him, that he will not do right? Then for the next point; suppose the cause is examinable, yet it need not be found in the verdict; for if a deprivation be found by the jury, we must presume it to be just; we are to give credit to a man who exercises judicial power, if he keep within his jurisdiction. The law has regard not only to courts of record, and judicial proceedings there, but to all other proceedings, where the person who gives his judgment or sentence; has judicial authority; and you shew no fault in the sentence; the jury do not so much as find that the matter and ground of it is untrue or insufficient in point of law, or any other fault or defect whatsoever; but it appears that the cause of deprivation is good, it being for contumacy. If the
bishop

bishop had power to visit in June, as I think he had, and was hindered by the shutting of the doors, on which he went away without doing any thing, and came again in July, when he held his visitation; and they carried themselves contumaciously and refused to submit to his authority; this was *contra officii sui debitum*. It is, by the constitution of the college, inseparably incident to their places, that both head and members should submit to the visitation. And contumacy is held a good cause of deprivation. It was held a good cause in Bird and Smith's case, and in the case of Allen and Nash; *quod fuit refractarius*. Now, though this be not one of the causes mentioned in the statute of deprivation, yet when the bishop comes to make a visitation and the members refuse to submit, it is certainly contrary to that duty which their places oblige them to perform. I do not think that entering a protestation against the visitation was any fault; that was surely very lawful; but their turning their backs upon the visitor, and not appearing upon summons, and refusing to submit to his examination, was an offence, and contrary to that duty, which the statutes require. For the visitor is to enquire into the state of the college, and each one's particular behaviour and conformity to the college statutes; and if he comes to make such an inquisition, and the head or the members absent themselves, or will not appear to be examined, it tends to the subversion of the whole constitution of the college, which is a good cause of deprivation. And though there is a particular statute which declares for what causes the rector should be deprived, of which this is none, yet that does not extend to a deprivation in time of visitation, but it shews in what manner the college shall proceed to get the rector, if guilty of such offences, removed: they may complain to the visitor, when he is not in his visitation, if he

he waste his revenues, or behave himself scandalously, and upon request, will not resign, and they may article against him, before the visitor, out of his visitation; but when he comes to execute his visitatorial power in the quinquennial visitation, he is to enquire into all the affairs of the college, and he is not to proceed, in that case, upon the information of the fellows, but he may proceed even to deprivation wherever he sees cause: and contumacy, I take it, is a cause of forfeiture of his office, being an offence against the very essence of his place, by which he is subject to the power of the visitor; and if he goes about to evade, or contumaciously refuses to submit to his power and authority, it is an offence against the duty of his place, and a good cause of deprivation. So that I hold, in this case, First, That the bishop of Exeter has a visitatorial power vested in him to deprive the rector, without the consent of the senior fellows. Secondly, that the justice of this sentence is not to be examined here. And, Thirdly, if it were, and the cause were necessary to be shewn, I think contumacy is a very good cause of deprivation, being an affront to the visitor in his visitatorial authority. Though, I do believe, Dr. Bury did not design to affront the bishop, but to assert his right; yet *ignorantia juris non excusat*. If the law be that he ought to submit, which he refuses, we cannot help it. I am far from being such a judge as shall lay an intolerable yoke on any one's neck; but I must say, if the head and members of a college will receive a charity with a yoke tied to it by the founder, they must be contented to enjoy it in the same manner in which they received it from him. If they will have the one, they must submit to the other. And so my judgment ought to be given for the plaintiff: but my brothers are all of a differ-

ent opinion, and so I submit to it; the defendant must have his judgment (*a*).

THERE is no question but the founder intended, that the secular power should not intermeddle in any case, with the members of his corporation. The founder was a bishop, as the greater part of the founders of colleges were; they were founded by them in times of Popery, when the clergy in general took themselves to be exempted from the jurisdiction of the King's courts; so that no doubt the statutes of this, and most other colleges, were compiled with a view to exclude the inspection of the secular authority (*b*).

THOUGH the general principles laid down here, by Holt, may be taken for law, yet it appears that judgment ought to have been ultimately for the plaintiff, because the bishop did not pretend to act by virtue of his *general* visitatorial power, but under the statutes; otherwise he had no occasion to suspend the senior fellows, in order to have a shew of having the consent of four of the senior fellows.

FROM this case it is apparent, that where there is a general visitor, and the time of his general visitation is not restricted by the statutes to particular periods, he may visit whenever he pleases; for in this instance the only objection to the visitation, in which the visitor deprived Dr. Bury, arose from his having made a visitation within five years before, and that objection was answered by shewing that the acts on which it was founded did not amount to a visitation.

(*a*) Vid. this case at full length in Skinner, 447—512, and C. J. Holt's argument in 2 Term Rep. 346, which is verbatim the same with that in Skinner.

(*b*) Skin. 513.

It is likewise apparent, that, though the time of a general visitation be restricted, the visitor may at *any* time take cognizance of any dispute between the members, on an appeal made to him for that purpose. This is particularly enforced by Holt, and not disputed by the other judges.

WHETHER a person, appointed by the statutes of the founder to take cognizance of certain particular things, be general visitor, without general words giving him that authority, depends on the nature of those particular things, and on the terms in which his jurisdiction over them is given: when, therefore, a question arises about the extent of the person's power who claims to be visitor, recourse must be had to the statutes.

EDWARD the third, by letters patent under the great seal, granted a licence to Elizabeth de Burgo, Lady Clare, to found and endow a college or hall in the 'university of Cambridge; in pursuance of this licence she founded Clare Hall, and for the regulation of the master, fellows, and scholars, gave a body of statutes, among which was one intitled *de amotione magistri*, by which she ordained, that if the master should be legally convicted of certain specific offences, or should conduct himself deceitfully or negligently in the care and government of the house, he should be removed, and that the chancellor, *to whose jurisdiction, visitation, correction and punishment in all things*, she subjected the master, or the vice-chancellor in the absence of the chancellor, together with two doctors or masters of the university, should take cognizance of the master's conduct, and with the consent of those masters or doctors, should, *definitively and in a summary manner, without a formal judgment, and even without writing*, remove him from the mastership, for offences of the nature before pointed out,

without any appeal from the sentence, or remedy by common law.

ANOTHER statute subjected the fellows, scholars, and servants of the house, to the inspection and correction of the master, to whom it gave the power, *if the quality of their excesses* should require it, to expel them from the house, and deprive them of all the privileges of the college, in a summary manner, *without noise and form of judgment, and without writing*: but it was provided, that if any of the fellows or any other should feel himself aggrieved by the sentence of the master, he might appeal to the chancellor or vice-chancellor.

THERE was another statute, which run thus: "Item volumus quod dictus Cancellarius magistrum et omnes socios et singulos domus prædictæ annis singulis si opus fuerit poterit visitare, et *si quid inter eos repererit corrigendum*, illud cum assensu duorum doctorum vel magistrorum prout in consimilibus superius est expressum debitè juxta juris et nostrorum statutorum exigentiam corrigat et puniat."

By another statute, it was ordained, that if any thing should be found doubtful or obscure in the statutes, which could not be amicably determined by the master and fellows, it should be immediately referred to the chancellor or vice-chancellor, who, by the advice and consent of two doctors, or of two batchelors, should interpret doubtful parts.

THE foundress, having reserved certain powers to herself, during life, expressly declared, that after her death, these should not belong to her heirs.

THESE statutes being set forth, in a case before Lord Hardwicke, he said it appeared clearly to him, that a general visitor was constituted by them: that, instead of creating a visitor by general words, the foundress had directed

rected, by the statutes, that the chancellor should visit the college, once in every year, *et si quid inter eos repererit corrigendum, illud, &c. corrigat et puniat*; if there had been nothing more than this, he would have been general visitor, and if he found a person taking part of the revenues improperly, he might, under the power here given him, remove such person in favour of him who had the right.

IN the next place the foundress had directed, that the chancellor, with his assistants, should construe the statutes and determine any doubt, and she had further, by express words, excluded her own heirs: nothing, his Lordship said, could be stronger than the exclusion of her heirs, to shew, she meant to give the chancellor a general visitatorial power: he was, therefore, clearly of opinion, that the chancellor was visitor of this college (a).

THE executors of Margaret Countess of Richmond, mother of Henry the seventh, according to the directions of her will, purchased from the bishop of Ely, with the consent of the prior and convent, the house or priory of Saint John, in Cambridge, and there founded Saint John's College. Fisher, bishop of Rochester, one of the executors, by the authority of the rest gave it a body of statutes. The master of the college, by the oath prescribed to him in these statutes, was bound, as soon as he could within a month after the commission of such offences by the fellows and scholars, as he was himself unable to punish, to reveal the names and surnames of the offenders, with the quality and degree of the offences, to the *bishop of Ely for the time being*, or the chancellor or vice chancellor of the university, for their correction and punishment.—By the same oath, if, on his account, any matter of dissention arose within the college, and could not, within five days,

(a) Attorney general v. Talbot. 3 Atk. 662, 673.

be reasonably and peaceably settled by the president, dean, or treasurers, and two others of the seven seniors of the college, he was to submit himself to the order, judgment, decree, and authority of the chancellor of the university for the time being, the provost of King's and the master of Christ's College, in the same university—and to abide by the sentence of them, or two of them, without appeal.

By the chapter *de morum honestate, et dissentionibus sedandis*, if any dispute arose between the master and any of the fellows, which could not be reasonably and peaceably determined by the master, deans, and seven seniors, within eight days, the contending parties, within three days after those eight, were to choose two fellows, who within two days of their election were to carry the complaint to the provost of King's, the master of Christ's, and the master or warden of Saint Michael's College, and whatever two of these, being consulted for the time should determine, all were by virtue of their oath to obey.

THE chapter *de modo procedendi contra magistrum*, after pointing out a mode of proceeding against him within the college for certain offences particularly described, ordered that, in case of his disobedience, complaint should be made to the lord bishop of Ely, or in his absence *in remotis*, to the vicar general of the spiritualities, or in the vacancy of the see, to the guardian of the spiritualities.—It then directed that the bishop of Ely, or in his absence *in remotis*, his vicar general, or in the vacancy of the see, the guardian of the spiritualities should take cognizance summarily and extrajudicially of all offences alleged against the master, and if he found the accusations to be true, he should immediately, or at least within three days, remove him from his office without further delay, and enjoin the fellows to proceed to the election of a new master, according to the directions

directions of the statutes; CESSANTIBUS APPELLATIONIS, RECUSATIONIS, QUERELÆ AUT CUJUSCUNQUE ALTERIUS juris aut facti REMEDIIS quibus hujusmodi AMOTIO VALEAT IMPEDIRI AUT DIFFERRI; quæ omnia IRRITA esse, volumus, statuimus et decernimus.

THE statute *de modo procedendi contra socios, scholares, et discipulos, in majoribus criminibus*, gave to the master, assisted by the president, deans, and treasurers, or at least one dean, treasurer, and four others of the seven seniors, to examine complaints against any of the fellows, &c. and if found guilty, to remove them from the college, *without remedy of appeal or complaint*.

By the statute *de ambiguis et obscuris interpretandis*, power was reserved to bishop Fisher during his life, to add to, reform, interpret, alter, and dispense with these statutes; but every body else was prohibited from dispensing with them, or making any new statutes, either with respect to the whole college or any member of it, and if the chancellor, or vice chancellor, or the REVEREND FATHER the *bishop of Ely*, or any one else, should attempt the contrary, and endeavour to introduce any new statute different from the foregoing, the master and all the other members of the college were discharged from the obligation of obedience under the pains of perjury and perpetual removal from the college. But the *visitation* of the college was recommended to the reverend fathers in Christ the bishops of Ely, to whom also was granted the presentation of a fit person to be a fellow in the college.

THE statute *de visitatore*, reciting the confidence of the author in the benignity of the most reverend fathers the *bishops of Ely*, and the hope that at no future time they would suffer the statutes to be violated, ordained, "that the bishop of Ely for the time being, as often as he should be

required by the master, president, deans, and treasurers, or by the master and four of the seven seniors, or by five of the same seven seniors in case of the opposition of the master or president, or by two-thirds of the fellows, and without any requisition, from three years to three years, might by himself or his deputy visit the college——— and duly punish and correct the offences and irregularities discovered in his visitation, and do every thing that might be necessary or convenient for the correction and reformation of them, even if he should happen to proceed to the deprivation or amotion of the master or president, or of any fellow or scholar, provided the statutes required such amotion — The party summoned to judgment was commanded personally to answer before the bishop or his commissary, without any privilege of appeal from the sentence; but it was provided, that if the matter proceeded to the deprivation of the master, or expulsion of a scholar, the consent of four of the seven seniors of the college then present in the university should concur, and that without such concurrence, any deprivation or expulsion should be void: in the case of the amotion of the master, too, even with the concurrence of four of the seven seniors, by the bishop's commissary, an appeal was given to the bishop himself, but without further appeal.

THE statute then proceeded thus: “*præter hunc visitationis modum, nos alium nullum Eliensibus episcopis concedimus; sed nec a sociis tolerari permittimus, aliquo pacto: quod etiam eis mandamus in vim juramenti sui. Scimus enim quod eximia virago domina fundatrix, dum in humanis egit, impetravit ab Eliensi episcopo qui tunc fuerat, jus foundationis, eâ quidem ratione ut ex desolatis ædiculis tam illustre collegium erigeret: quod cum effec- rit et consummaverit magno suo sumptu, par est ut Elien-* ses

ses episcopi nihilo majorem in hoc collegio sibi vindicent auctoritatem quam in cæteris academizæ collegiis, ubi non sunt fundatores."

QUEEN Elizabeth afterwards, as heir to the foundress, gave the college a new body of statutes in many respects similar to bishop Fisher's, but the statute *de visitatore* did not contain the clause just mentioned.

By the statute which prescribed the mode of electing the master, it was ordained, that if that mode could not be put in execution, recourse should be had to the visitor, and that he should be master whom the visitor alone should appoint, provided he answered in all points to the statute concerning the quality and office of master.

By the chapter relating to the election of president, lecturers, and other officers, it was ordained, that if the mode there pointed out should fail, he should be considered as elected whom the *master alone*, if he should happen to be within the kingdom, should appoint; but if the master should be out of the kingdom, then he whom *the bishop of Ely*, visitor of the said college, being within the kingdom, should appoint, was to be elected into the office.—The same directions were given with respect to the election of fellows.

A STATUTE which pointed out the mode of proceeding against the master, and expelling him for certain offences, ordained, that if he would not retire of his own accord, recourse should be had to *the bishop of Ely*, or in his absence *in remotis*, or in the vacancy of the see, to the chancellor of the university, &c. and that the *bishop of Ely*, &c. should take cognizance of the complaint in a summary and extrajudicial manner, and that there should be no appeal from his sentence.

THE statute "de ambiguis et obscuris interpretandis," after reserving to the Queen the power of reforming, changing,

changing, and dispensing with these statutes, and of adding new ones if need should require, prohibited all others from exercising any of these powers; and if the chancellor or vice chancellor, or the *reverend father the bishop of Ely*, or any other should attempt to infringe this prohibition, absolved the master and others from their obedience: but the solution of any doubt about the meaning of the statutes was referred to the *bishop of Ely for the time being*; and to his determination the college were ordered to pay full obedience.—The statute then recommended in express terms the *visitation* of the college to the reverend fathers the bishops of Ely; to whom also it granted the presentation of one fit person to be a fellow, interpreting that fitness to be the possession of the qualities required by the statutes, and prohibiting the college from *receiving* any other.

THE statute “*de visitatore*” was nearly to the same effect as that of the same title in bishop Fisher’s statutes, except that it did not empower him to visit by his commissary, nor contain the clause prohibiting him from visiting in any other manner than that pointed out by the statutes.

THE statute “*de modestia, et morum urbanitate*” ordained, that all domestic disputes should be judged and decided *within* the college, and that he “*qui foras aliquem in jus vocaverit,*” without the consent of the master, or, in his absence, of the greater part of the seniors, should be removed from the college.—Disputes between fellows and scholars were to be decided by the master, &c. but a dispute between the master and any of the fellows, by the president and the rest of the seniors, &c. but if that could not be done within two days, the dispute was to be referred to the provost of King’s College, and the masters of
Trinity

Trinity and of Christ's; and he who should disobey the sentence of them, or two of them, should be removed from the college.

A DISPUTE having arisen between the college and the bishop of Ely, on the question, whether the latter was visitor, as to the election of fellows, these two sets of statutes were laid before the court of King's Bench, to enable them to decide it.

IN opposition to the claim of the bishop, it was argued, that the founder might give general or particular powers to a visitor: if he gave only particular powers, and the visitor exceeded them, his proceedings would so far be void. Visitatorial power was not to be inferred by implication, but must be constituted by express appointment, as appeared from the case of Birmingham school (*a*): The bishop of Ely was in no part of the statutes appointed *general* visitor of the college, but *particular* visitor only; the general power, therefore, remained in the crown, as heir to the founder: particular visitatorial powers being given to the bishop, would not make him general visitor, though he was recognized in other parts of the statutes, under the general *name* of visitor: an executor might be appointed with limited powers, and, in such a case, if he were mentioned as *executor* in another part of the will, that would not make him *general* executor. In the chapter "de ambiguis et obscuris interpretandis," power was reserved to Queen Elizabeth of adding new statutes and dispensing with the old; and immediately after the bishop of Ely was particularly named as one of the persons prohibited from counteracting the statutes; it was true the visitation was recommended to him, but it was with this limitation, to compensate which, he was complimented with the nomi-

(*a*) Vid. ante, p. 187.

nation of a fellow; but the master and fellows were to judge of the fitness of the person named, and were prohibited from *receiving* one who was not fit, though presented by the bishop, which shewed, that he was not universal arbiter and incontrollable judge.—The statute “*de modo procedendi contra magistrum*” gave powers to the chancellor of the university, and others, altogether inconsistent with the bishop’s claim as general visitor. The statute “*de modestia*” directed all domestic disputes to be settled *within* the college; ordered him to be expelled *qui foras vocaverit*; and referred the determination of them to other persons exclusive of the bishop.—The statute “*de visitatore*” gave him power to visit as often as he was requested, and gave him many minute particular powers, which *excluded* the supposition that he was *general* visitor.—If then the bishop was not *general* visitor, he had nothing to do with elections; for there was no special clause, which invested him with the right of inspecting them.

LORD MANSFIELD, after premising some observations on the convenience of the visitatorial power, proceeded to observe, that the founder might delegate this power either generally or specially; by prescribing, in the *latter* case, a mode for the exercise of any *part* of it; but that if a mode of visitation was prescribed, in any particular case, that would not take away the general powers incidental to the office of a visitor: and of those incidental powers, that of hearing complaints and deciding them, had in the case of Philips and Bury (*a*), been determined to be one, and this latter included a jurisdiction over elections.—The whole tenor of the statutes must be examined, to see whether the *general* power was given or *intended* to be given. A founder might appoint a special visitor for a particular

(*a*) Ante, p. 197.

purpose;

purpose; and he might divide the power into as great a variety of statutes, for particular cases, as he pleased: but when he did that, the court would collect, from the whole considered together, whom he intended to appoint as *general* visitor.

HIS Lordship then alluded to the case of Clare Hall (*a*), and remarked on the decision of the lord chancellor in favour of the *general* visitatorial power, though there were no words expressly appointing a general *visitor*.

HE then proceeded to observe, that the founder might appoint a *general* visitor, and except some particular cases out of his general jurisdiction; or might in others prescribe another method of proceeding, without resorting to the visitor in the first instance.—He then proceeded to consider the present case on the statutes of Queen Elizabeth; for those of bishop Fisher, he said, were no otherwise material than as they might throw light on the new ones, which referred to them in the preamble; as the common law or an old act of parliament might throw light on a new act, which in some respects altered the former. Where a body of statutes was given by a founder, and a visitor appointed, he much doubted, he said, whether the visitor could give new laws, unless the founder gave him an express authority for that purpose; though he knew there were cases in which visitors, not being expressly prohibited, had exercised such a power; he mentioned this, he said, because he observed a jealousy in the foundress in the present case, lest the right of making statutes should be taken from her heirs, that is, from the crown. The bishop was, therefore, appointed visitor, and not legislator; the legislative power being reserved to the crown, the heir of the foundress: in Bentley's case (*b*) it had been held, that

(*a*) The case immediately preceding.

(*b*) Ante, p. 103.

when

when the founder had given a complete body of statutes, his heir, which in that case was the crown, could not alter them, or give new ones without the consent of the college, but here was an express *reservation* of such a power.

THE particular powers granted by the statute “*de modo procedendi contra magistrum*,” to the chancellor and the heads of three colleges, and some other particular cases, seemed only exceptions to the general visitatorial power. The question therefore was, whether all the rest of the visitatorial power, not so excepted, was not vested in the bishop of Ely.—This depended principally on three statutes. That “*de electione magistri*,” that “*de ambiguis interpretandis*,” and that “*de visitatore*.”

THE first of these referred to the bishop, as the known visitor of the college, and by words which would alone be sufficient to make him a visitor, if no other general visitor were appointed; and if the general power were in the vice-chancellor, who was named in one single instance, or in the crown, because it had the legislative power, this statute would be void.

THE second gave express authority to the bishop to determine, interpret, and explain the statutes. This was as comprehensive an authority as a visitor could have; a power to interpret implied a power to visit, and had been held in the case of Clare Hall to constitute a visitor. The words at the end of this statute, “*visitationem commendamus*,” were strong and explicit words, to constitute a general visitor.

THE third gave the bishop a power to visit, and “to do and exercise, &c.” and though it was expressed, that he should visit when requested, yet that did not restrain him from visitatorial acts at any other time; as in the case of Clare Hall, though the visitor was to visit *de anno in annum*, and
in

in that of Philips and Bury *de quinquennio in quinquennium*; yet that did not restrain him from hearing complaints at *any* time.

THE visitatorial power was almost as strongly given to the bishop by the old statutes, as by the new: the difference was, that in the new statutes, the ambiguous clause in restraint of his power, towards the end of the old statute "de visitatore," was omitted. But what was there said did not restrain the bishop so strongly as might at first sight appear.—The meaning of the provision seemed to be, that he should claim no right as a co-founder, though he was owner of the site; but only act as in other colleges, where he was *not* founder. And in colleges where he was *not* founder, he might act under powers of visitation *delegated* to him by the founder.—On the whole his lordship, and the rest of the court concurred with him, was of opinion, that the bishop of Ely was general visitor of this college, and as general visitor had jurisdiction over questions relating to elections of fellows (*a*).

IF on an application to the King's courts for their interposition, by the member of an eleemosynary foundation, in a case coming within the general visitatorial power, it appear that there is a visitor, and that no application has been made to him, the courts will not interpose, because no court of law or equity can anticipate the judgment of the visitor, or take away his jurisdiction (*b*).

IF in the return to a mandamus directed to a college it be set forth, in general terms, that such a person is visitor, it is not necessary to specify his powers, for as visitor, he has power to determine all matters that come as griev-

(*a*) Master and senior fellows of St. John's College, Cambridge, v. Todington, Clerk, 1 Bur. 158. 1 Bl. 71. Rex. v. bishop of Ely.

(*b*) Per Ld. Hardwicke. 3 Atk. 674.

ances before him, unless he be particularly restrained by the statutes, and such restraint will not be presumed; neither is it material whether the grievance of which complaint is made, took place in the time of the present visitor, or in that of his predecessor, and therefore it is not necessary to shew that in the return (*a*).

THE question, whether there be a visitor or not, may be sometimes decided on affidavits: but if a mandamus has been granted, commanding the party to whom it is directed to admit a person to a fellowship, on an affidavit of his election, the court will not supersede the writ on affidavits that there is a visitor, but will put the defendant to make a return, because where the point is determined on affidavits against the party complaining, he has no opportunity to do himself justice by an action (*b*).

WHEN the existence of a visitor is not doubted, it frequently becomes a question, whether the person complaining, or the act of which the complaint is made, be within the visitor's jurisdiction, and the determination of such questions belongs ultimately to the King's courts, though the visitor may decide in the first instance.

It has been observed (*c*), that independent members of colleges in the universities, or fellow commoners, are mere boarders, and have no corporate rights: it follows, from hence, that they are not subject to the jurisdiction of the visitor, and that they cannot obtain redress for any grievances, by appealing to him.

JOHN DAVISON was admitted a commoner of University College in Oxford, and after having performed the greatest part of his public exercises, and having kept all the terms but one, requisite for the purpose of taking the degree of

(*a*) Case of All-Souls, Oxford. Skin. 13. 2 Show. 170.

(*b*) Rex v. Whaley, 2 Str. 1139.

(*c*) Vol. 1, p. 330.

batchelor of arts, he was expelled from the college.—University college being of royal foundation, Mr. Davison presented his petition to Lord Chancellor Apsley as visitor. The petition stated, that the college was founded by King Alfred in the year 872; that by *charter* it consisted, at the time of the petition, of a master, twelve fellows, and *other* members; that the petitioner was admitted according to the tenor of the charter; that he was expelled by the master and *five* fellows, who were not one half of the fellows of the college: he therefore prayed, that the matter might be taken into consideration; that the master and fellows might be ordered to attend; and that the charters, books, and statutes might be produced and inspected at the hearing of the petition; and in general, that the appellant might be redressed.

THE Lord Chancellor ordered, that the parties should attend, and that the public books, &c. should be inspected. On this, the college presented a counter-petition, suggesting, that certain allegations in the appellant's petition were unsupported by evidence, particularly these:—"that the college now consists, by *charter*, of a master, twelve fellows, and *other* members:"—"that your petitioner was admitted a member pursuant to the charter."—Whereas they shewed, that the college was a corporation by *prescription*, though confirmed by several royal charters; that it was an eleemosynary corporation, and consisted only of a master, and twelve fellows; that they were advised and submitted, that commoners, or such as paid for their lodging and diet, and were independent, *did not belong to the college*, nor were of the foundation: that they were, of course, not entitled to the protection of the visitor, and could have no title to the production of the college papers. They therefore prayed, that they might be heard against

the petition of the appellant, and that so much of the above order as related to the inspection and production of the college books, &c. might be suspended till it was determined, "whether this were a matter of visitatorial cognizance?"

THE lord chancellor accordingly suspended that part of the order.—The master afterwards made an affidavit, that the college was *merely eleemosynary*; that it had undergone various changes, till at last, Queen Elizabeth, in the 15th year of her reign, incorporated it, "per nomen magistri et sociorum collegii magnæ aulæ universitat' Oxon;" that in the said grant there was no mention of any commoners, or other persons independent of the foundation, and that Mr. Davison never was a member of the society, nor ever belonged to the society in any sense.

ON the part of the college, it was argued, that the visitor's jurisdiction was confined to the foundation, and was derived solely from the intention of the founder with respect to the distribution of his property: that independent members were pupils received into the college by the master and fellows, and submitted to their *discretionary* government; that they were strangers to the foundation, and therefore had no other remedy, in case of particular grievances, than that which the laws of the land afforded them. They had no appeal to the visitor's jurisdiction. The visitor could not give costs, and young men of fortune might ruin, or at least harass the university by continual vexation.

ON the part of the appellant it was insisted, that the visitor's jurisdiction was not confined to the foundation, but comprised the whole government of the college; that the independent members, though strangers to the eleemosynary

synary constitution, were not strangers to the college, being recognized, described, and defined in the constitution of the university; for that by the university statutes, a degree could not be taken by a person not a member of a college. That the same statutes described the duties, privileges, ranks, and habits of independent members, according to their several orders. That these descriptions and definitions were acknowledged by those laws which affirmed the constitution of the university. That those laws would imply, on the part of members admitted *intra mœnia ædis*, submission to the orders and statutes of the society, and on the part of the college protection and redress.—The relation, therefore, of these independent members to the college being legally recognized, definite and certain, they had an appeal to the visitor.

THE Lord Chancellor, with the advice of De Grey, lord chief justice of the Common Pleas, and Mr. Baron Adams, dismissed Mr. Davison's petition (*a*).

NEITHER, in a matter which concerns the discipline of the college, can an independent member have redress in a court of law.

ON the trial of an indictment for an assault on Charles Crawford, Esq. a fellow commoner of Queen's College, in the university of Cambridge, in turning him out of the garden belonging to the college, evidence was offered, on the part of the prosecutor, to shew the illegality of several sentences of expulsion of the prosecutor from the college, and of the confirmation of the said sentences; but of which confirmation no notice was given to the prosecutor.—A special case was reserved for the opinion of the court of King's Bench on the admissibility of this evidence; and

(*a*) Ex parte John Davison, Esq. at Lord Apsley's house, July 25th, 1772, cited Cowp. 319.

it was agreed that, if they should be of opinion that it was admissible, the parties on both sides should produce to the court such parts of the statutes, or other instruments, as might be proper to support or invalidate such sentences, in order that the court might judge of the legality or illegality of them.

WHEN the case first came before the court, and the counsel for the prosecutor had begun, Lord Mansfield stopped him, saying, that on the case, as then stated, nothing appeared to the court of the foundation of the college, or of their jurisdiction, or of the statutes, or of the facts, all of which were necessary to be stated to enable the court to form a judgment on the questions reserved. His lordship added, that if the prosecutor were a *member* of the *foundation*, the sentences might be conclusive, until reversed by the visitor: if only an *independent* member, it might be defensible in those who had the management and direction of the college to expel him.

THE case was afterwards made compleat by the addition of the *order of rustication* of the prosecutor, signed by the master and *one* fellow; the sentence of expulsion made by the master and *two* fellows, but signed only by the master; the order of *confirmation*, signed by the master and *ten* fellows; a copy of the statutes of the college, of which the statute *de perendinantibus* was alone material; and an interpretation of the words "MAJOR PARS SOCIORUM," which occurred frequently in the statutes, and which, by such interpretation, was construed to mean the major part of the fellows *resident* in college.

THE statute *de perendinantibus* was as follows:—"Statuimus quod nullus ad *perendinandum* in hoc collegio admittatur, nisi de expresso consensu presidentis, et *majoris partis sociorum*; quibus constet de ipsius bonâ famâ conversatio-
neque

neque laudabili, et quem crediderint quiete victurum inter socios. Et si oppositum constiterit post ejus ingressum, primo admoneatur per presidentem vel ejus vicegerentem; et si tunc non emendatur, moneatur secundo per duos socios tunc domi presentes; quod si adhuc non se reformaverit; tertio per presidentem et majorem partem sociorum expellatur a collegio in perpetuum. Quod si quis perendinantium, aliquod crimen committat unde scandalum aut infamia eidem collegio oriatur, idem ab hoc collegio expellatur."

ON behalf of the prosecutor it was contended; first, that the sentence of expulsion was examinable in this court; and secondly, that it was irregular, and consequently illegal.—On the first point it was observed, that colleges were instituted not merely for the purpose of distributing the founder's bounty, but that, like all other corporations, they had for their object the public utility; they might then be considered in two different points of view: first, as corporate bodies, and, secondly, as eleemosynary; in each of which characters they were subject to a different jurisdiction; in matters which concerned their public, their corporate character, they were, like every other corporate body, subject to the controul of the general law of the country; in matters which regarded their private, their eleemosynary character, their proceedings were subject to the examination of their respective visitors.

THESE institutions, it was further observed, were in general composed, not only of members who participated of the endowment, but of others who did not. The latter, however, were considered strictly as members of the college. The terms of their admission, their rank, their habits, their privileges, their discipline and regulation, the causes for the censure or expulsion of them, were defined and prescribed by the statutes which formed the gene-

ral constitution of the college. In virtue of this relation they claimed to be members of the university, or aggregate corporation composed of the members of the different colleges. In this character they were subject to further regulations, and, in return, received essential advantages: they became intitled to different degrees, distinctions, and valuable privileges in the learned professions, and to a qualification as electors or representatives for the university in parliament. If the sentence by which Mr. Crawford was deprived of the rights incidental to his character as a member of the college were not examinable in the court of King's Bench, he was without a remedy; for, as had been settled in the case of Mr. Davison, the province of the visitor was confined to cases in which the founder's property was concerned; but it was sufficient that the proceeding was without redress from any other jurisdiction, to render it amenable to this court, which ever interposed to prevent a defect of justice to the subject.—This court would, therefore, not consider themselves as precluded from an examination of this sentence, and a declaration that it was irregular, if it should be so found, which was all that the present case demanded: for the question was simply, whether the sentence was a regular sentence of expulsion? If it was not, the defendants were guilty; if it was, they must be acquitted.

LORD Mansfield, after having stated the case, proceeded to observe, that the prosecutor, after these proceedings, continued by force, and in despite of the college, till the fact happened for which the indictment was brought: but that he had never before made any complaint about the proceedings, nor appealed to the visitor. The question on these facts, he said, was, whether, after the proceedings so had against him, he had a right to continue in the college?

lege? It had been argued on behalf of the defendants, that he was a mere boarder ; and if so, that he had no right to continue after the notice given him to leave the college ; and the court all thought that he *was* a mere boarder.— His lordship then cited the case of Mr. Davison at full length, and then proceeded to observe, that the order in that case was expressly founded on the ground of the appellant being an independent member and a mere stranger. Here the prosecutor was an independent member, and therefore the authority just mentioned put an end to the question, because as a *mere boarder* he had no right to continue in the college after they had given him notice to quit. It might be said, there was a difference between that case and this, because the statutes of University College took no notice at all of independent members or strangers ; whereas in the statutes of Queen's College there were express regulations concerning them ; and on the supposition that Mr. Crawford was subject to those regulations, it was contended that the sentence of expulsion was illegal : and at the trial the statutes had been offered in evidence, to shew that it ought to have been signed by the master and a *majority* of the fellows, whereas it was signed by the master and *one* fellow only. The answer to this was, that if the allegation were well founded, that Mr. Crawford was a member, and subject to the statutes, rules, and orders of the college, the merits, the justice, or the regularity of the expulsion could not be examined at the assizes ; but the proper mode of impeaching it was by appeal to the visitor (a).

WHETHER a person who is not yet actually a member of an eleemosynary corporation, but who claims a right to become one, be a proper subject of the visitatorial jurif-

(a) Rex v. Grundon et al', Cowp. 315—322.

dition, has been doubted.—White, the founder of St. John's College, in Oxford, had appointed that there should be a president and fifty scholars there, of whom forty-three should be named by particular schools in London, and the remaining seven by three cities, of whom Bristol was to name two: on a vacancy by the resignation of one Baskerville, the city of Bristol named one King to succeed him; the college refused to admit him, and chose another person. Application being made for a mandamus commanding the president to admit King, it was objected that the bishop of Winchester was visitor, and was to determine all disputes concerning the foundation; to which it was answered, that the person in whose behalf the application was made was only a nominee, and not yet of the foundation, and that therefore this dispute was not within the visitor's jurisdiction; the court ordered the statutes of the college to be laid before them, and adjourned the question (*a*). It appears, however, by another report, that they granted the mandamus to admit King (*b*): but as this was a question that clearly concerned the constitution of the college, it seems to have been proper for the cognizance of the visitor (*b*).

IN most of the colleges of the universities, new fellowships have been added to those of the foundation by subsequent benefactors.—These are called ingrafted fellowships; and where the founders of them make no statutes for the regulation of them, they are subject to the general laws of the college, and consequently to the visitor's jurisdiction.

THE first case we find on this subject is that of Mr. Jennings, of Clare Hall, which came before the court of King's Bench, on the return to a mandamus directed to

(*a*) *Rex et Reg. v. St. John's College, Oxford*, 4 Mod. 260.

(*b*) *Comb.* 238.

the master and fellows, commanding them to admit (a) Mr. Jennings to a fellowship on the foundation of Mr. Dickins. The return stated several of their statutes, by one of which it alleged the chancellor was appointed the visitor of the college. — On this it was observed, in behalf of Mr. Jennings, that the statutes of my Lady Clare, which put the master and fellows founded by her under the controul of the chancellor, did not extend to those fellowships which were founded afterwards by others; for which reason, and as there was no other remedy, a peremptory mandamus was prayed. The point was not determined; but the Chief Justice said, “How can they bring in strangers, and make them subject to the restrictions imposed by the founder? Though there be a visitor for the fellows founded by my Lady Clare, yet the question is, whether this visitor shall be extended to the new fellows? Whether there must not be a new incorporation of the second fellowship founded by Dickins?” (b)

In the year 1740, a case from University College, in Oxford, came before Lord Chancellor Hardwicke, as general visitor of the college in right of the King: it appeared that the college was founded by King Alfred, and that William of Durham had afterwards founded two fellowships, “de proximis Dunelmiae partibus;” but had given no statutes. These *ingrafted* fellowships were therefore considered as subject to the general visitor of the old foundation. In that capacity Lord Hardwicke took cognizance of the complaint, determined it in a summary way against the college, and would not permit it to proceed in the course of charity causes (c).

(a) The report says “restore,” but as it appears, by the subsequent part of the case, that the dispute was about the validity of the election, it was probably a mandamus to “admit.”

(b) Mr. Jennings’s case, of Clare Hall, 5 Mod. 421.

(c) 3 Atk. 667. 1 Bur. 203.

JOHN FREEMAN, of Billing, in the county of Northampton, by his will in 1615, directed 2000*l.* to be laid out by his executors in purchasing lands of inheritance of the yearly value of 100*l.* the rents to be applied to the maintenance of two poor fellows and eight poor scholars of his foundation, in the house or college called Clare Hall, in the university of Cambridge, for ever, in the proportion of 25*l.* a year to each of the fellows, and 5*l.* to each of the scholars: he directed that his kinsmen, if there should be any of that description, should be first preferred; next to them those who were born within the county of Northampton, and next to them those who were born within the county of Lincoln.—The executors, in pursuance of the will, laid out 2000*l.* in purchasing lands of inheritance of the yearly value of 100*l.* and upwards, and the master and fellows having accepted the donation on the terms and conditions on which it was given by the testator, the executors executed a deed in 1622, to which they were parties of the one part, and the master and fellows of Clare Hall of the other, by which the purchased lands were limited and settled for the perpetual establishment and endowment of two fellowships and eight scholarships, on the foundation of John Freeman, the testator.—From the year 1622 to 1726, the masters and fellows of Clare Hall pursued the intention of the founder, without deviating in one single instance.—The first fellow chosen into the college contrary to the will was in 1726, and the same innovation continued in every subsequent election for the next twenty years.—Thomas Neal, a fellow on Mr. Freeman's foundation, in 1743 resigned his fellowship, on which Robert Mapletoft, a bachelor of arts, and born at Byefield, in Northamptonshire, offered himself a candidate; and though there was no other candidate of the founder's kindred, nor
any

any person born in Northamptonshire or Lincolnshire, yet the master and fellows elected William Talbot, a person not related to the founder, and born in the county of Bedford.

MAPLETOFT filed an information in Chancery in the name of the attorney general, in which he stated these facts, and insisted that the election of Talbot, being made in direct contradiction to the express terms of the donation, was void; and that the relator being the only competitor duly qualified according to the intent of the founder, and no objection of unfitness having been imputed to him, ought to have been elected into the vacant fellowship, not merely in preference to Talbot, but in exclusion of him.— He therefore prayed “that the propriety of the said foundation of two fellowships and eight scholarships might be asserted and established by a decree of the court, and that the fellowships and scholarships might, according to the true intent and meaning of the founder, be declared to have been absolutely appropriated to, and belong in the first place to the testator’s kinsmen, if any there were; and, next to them, to those that were born within the county of Northampton; and, next to them, to those that were born within the county of Lincoln, and should be fit for the same; and that the election of the defendant, William Talbot, into the fellowship vacant by the resignation of Thomas Neal might be superseded, and the relator forthwith admitted to and instated in the same. —”

THE defendant, William Talbot, as to so much of the information as sought relief in all the several matters therein mentioned, pleaded that Edward the third, in the twentieth year of his reign, by letters patent under the great seal, granted licence to Elizabeth de Burgo, then Lady Clare, to found and endow the college or hall called
Clare

Clare Hall, in the university of Cambridge, for the perpetual maintenance and subsistence of a master, divers fellows, and scholars in the said college or hall, who should apply themselves to the study of learning.—He then stated the foundation of the college in pursuance of the licence, and the statutes of Lady Clare, before stated (a).—He then averred, that the said statutes were all that, in any respect, related to the constitution of a visitor of Clare Hall, and that there was no deed or writing, other than these, which any way related to that subject; and insisted that the chancellors, for the time being, of the said university had been ever since the visitors of the said hall; and that the chancellor for the time being, his deputy or vice-chancellor, had, with the advice and consent of two doctors, if any such there were, or otherwise of two masters of arts, one a regent the other a non-regent master, heard, adjudged, and determined, and of right ought to hear, adjudge, and determine all disputes, complaints, and controversies concerning the election and admission of any person into the place of one of the fellows or scholars of the said college, and that such controversies had not been, and of right ought not to be heard, adjudged, or determined before any other court or judicature, or in any other manner whatsoever.—He further alleged, that at the time of the election of the defendant, the Duke of Somerset was, and still continued to be the chancellor and visitor of Clare Hall; and that the relator, Robert Mapletost, had not appealed to the said chancellor as visitor of the said college or hall, to hear and determine the right of election, as he might and ought to have done:—He then prayed the judgment of the court, whether he ought to be compelled to

(a) Vid. ante, page 227.

make any other answer, or whether the court ought to proceed any further in the suit.

AFTER argument at the bar, the Lord Chancellor said, he had received satisfaction enough at present to determine this plea, but not to make a final determination, for that the relator was not precluded from entering into proof to falsify the plea.—It was, he said, a case of great consequence to the colleges in the universities, who had had many litigations about the powers and rights of visitors, and how far the courts of justice had a jurisdiction in matters of that kind; and if it should be hastily determined that colleges were liable to informations in this court, on the footing of general charities, and accountable for misapplications and abuses, he was afraid a door would be opened to great vexation and expence.—There were two questions which occurred in this case; first, whether by the plea it was sufficiently shewn that there was a general visitor of this college? The second, whether that visitatorial power extended to Mr. Freeman's foundation? As to the first, he was of opinion that there was a general visitor, and expressed himself to the effect explained in a former page (a). As to the second, taking it as established that there was a general visitor of the college, he thought his power extended to Mr. Freeman's foundation. Mr. Freeman had directed 2000*l.* to be laid out in lands, the rents and profits of which were to be applied towards the maintenance of ten poor scholars in Clare Hall, namely, to two poor fellows, *there to be placed*, 25*l.* each, &c.—What was Clare Hall? A corporation consisting of masters and fellows; and the power given by the charter, was to incorporate by this name indefinitely, not mentioning any *number* of fellows. It had been objected, that nothing

(a) Vid. ante, page 228, 229.

appeared which imported that these new fellowships should be incorporated with the old ; but his lordship was of opinion, from the words "*there to be placed*," that it was the intention of Mr. Freeman that they should be incorporated, though unquestionably the rules laid down by him as founder, with respect to the fitness of the persons, ought to be observed. What then was the consequence of this ingraftment ? It had been said that these fellows were not subject to the same rules, nor to be governed by the same visitor with those of Lady Clare's foundation. As there were in colleges so many ingrafted charities, this became a question of considerable importance : it had been objected, that the statutes could only extend to the corporation of Edward the third ; that the corporation could not extend itself ; and that Mr. Freeman had not, by his donation, made his fellows members of it. If Edward the third, he said, had made his corporation to consist of twelve fellows, a certain number being then limited, these new fellows could not have come in without a new incorporation ; but here, the number being indefinite, he saw no rule of law to prevent the master and fellows of Clare Hall from incorporating these fellows. A lay corporation, where the number was indefinite, might incorporate new members, if they did not make an ill use of such power : if they might be ingrafted into this college, then they were members, and must be governed by the statutes of the college, and the rules of its discipline ; as a consequence of which they were subject likewise to the visitatorial power of the visitor of the college ; and if they were subject to it with regard to amotion, they were equally liable with regard to election. It had been said, however, that the visitor could not have a right to determine as to the agreement or contract made between the masters and fellows and Mr. Freeman's

man's executors: but the agreement of the masters and fellows, he said, to receive two new fellows, was an act into which the visitor had a right to examine, and implicitly gave him a power over them; he might have enquired into it within the year, as it was a transaction in that college, the whole of which was subject to his jurisdiction.

A VISITOR, he continued, was a much more proper judge of the comparative fitness and qualification of candidates than a court of law or equity, as they were more conversant in matters of that kind. But he was further of opinion, that the relator had excluded himself from entering into this question, by expressly praying to be admitted a fellow of this college; and he must consider every *fellow* of the college as a *part* of the college: for there was no averment that these new fellows were not a part of the corporation, or that they might not be masters of the college, or enjoy any other office under the original foundation.—He was likewise of opinion that, as the charity was already established, an information in this court was improper, and that, if the visitor had not jurisdiction, the application should have been to the court of King's Bench for a mandamus to determine the right between the parties (*a*).

BETWEEN the time when the statutes of bishop Fisher were given to Saint John's College, Cambridge, and the promulgation of the statutes of Queen Elizabeth to the same college (*b*), John Keton, doctor of divinity, and canon of the cathedral church of Salisbury, founded two fellowships and two scholarships there.—This foundation was by indenture dated the 27th of October, in the 22d

(*a*) Attorney Gen. v. Talbot. 3 Atk. 662. 1 Ves. 78.

(*b*) Vid. sup. p. 229, 233.

year of Henry the eighth, and made between Sir Anthony Fitzherbert, knight, then one of the justices of the Common Pleas, and Dr. Keton of the first part, the chapter of Southwell, in the county of Nottingham, of the second part, and Saint John's College of the third part, by which it was agreed, that Dr. Keton should have two fellows and two scholars sustained at the costs of the college for ever, of his foundation, over and above the number of fellows and scholars then established there, with the same emolument and advantages as other fellows and scholars of the college, and an additional stipend of 13s. 4d. per annum to each of the said two fellows: that Sir Anthony Fitzherbert and Dr. Keton, or the survivor of them, should have the nomination of the said fellows and scholars, during their respective lives, and after their decease the college should have the election, according to such directions as the said Dr. Keton, by his will or otherwise, should give: provided that the said fellows and scholars should be elected out of such persons as were or had been choristers of the chapter of Southwell, if any fit person could be found in Southwell; but if no fit person could be found there, then out of such persons as had been choristers in Southwell, and were resident in the university of Cambridge at the time of the election; and in default of such, then out of the most singular in manners and learning, of what country soever, then resident in Cambridge: that the master, fellows, and scholars of the old foundation, as well as the fellows and scholars of Dr. Keton's foundation, should take an oath to observe Dr. Keton's statutes, provided these should be agreeable to the statutes given by the foundress of the college: in consideration of all which, Dr. Keton had given to the college 400l.—And it was further agreed, that if the college should fail in taking, admitting, receiving,

receiving, or maintaining the said fellows and scholars, according to the said ordinances and agreement, they should forfeit to Sir Anthony Fitzherbert and Dr. Keton, and to the chapter of Southwell, and to their heirs and successors, in the name of a penalty, 20s. for every month that the said fellows, &c. should be excluded or restrained, &c. for which they should be at liberty to distrain in certain manors belonging to the college.

DR. Keton made no other regulation than what was contained in the indenture.

IT having been decided (*a*), that the bishop of Ely was general visitor of the college, and consequently, that he had jurisdiction over the election to fellowships of the *old* foundation, it became a question, in the 30th of Geo. II. whether his visitatorial power extended to those of Dr. Keton's foundation; and if it would have done so, had there been no clause of distress in the deed of annexation, whether the insertion of that clause excluded it.

THAT the bishop was visitor, as to Dr. Keton's fellowships, as well as to those of the old foundation, was argued on these grounds; that the original foundation of the college was on the express condition, that the bishop of Ely should be visitor; that Dr. Keton was, in effect, only a *purchaser* of two fellowships, and two scholarships, which, therefore, were to be considered as incorporated with the original foundation; that Queen Elizabeth's statutes were subsequent to this incorporation; that these two fellowships and two scholarships were, therefore, *part* of the college, when the visitation of it was recommended to the bishops of Ely for the time being; that these subsequent statutes constantly spoke of the bishops of Ely as *general* visitors of the college at that time, and not as being

(*a*) Ante, p. 239.

constituted so, by those statutes themselves; that the *original* and *annexed* foundation, as to the bishop's general visitatorial authority, were within the same reason; the ingrafted fellows were bound by the statutes in being at the time of the ingraftment, and even swore to the observance of them; that, in the present case, no new statutes were given by the founder of the annexed fellowships; that the power he reserved was only to give the additional statutes conformable to the old, and the indenture referred throughout to the original foundation.

As to the second point, it was argued, that the deed giving another remedy by distress, did not exclude the visitor: the distress was given to the church of Southwell, and not to the person injured in point of election and admission: but, if it had been given to the party injured, that could not have taken away his right of appeal to the visitor for relief: the one was in order to obtain election and admission, the other for the profits: the specific relief must come from the visitor; the distress would be only for the delay. These new fellowships were, by the deed, to have all the rights of other fellows: one of these was a right of appeal. The *nomine pænæ* and the clause of distress, given to the church of Southwell, could not take away the distinct rights of the candidate and of the bishop: *they* had a right to the *remedy*, but not to the *penalty*; *that* belonged to the church of Southwell: but had the penalty been given to the candidate, that could not have discharged the obligation of the college to perform their contract; and the restriction, from going *foras* (a), did not exclude the visitor, for he was domestic; it only excluded *forensic* jurisdictions, courts of law.

In support of this reasoning was cited a case which had occurred in this very college, in the year 1726, and in which

(a) Vid. ante, p. 236.

the college had submitted to the visitor's jurisdiction. That case resembled exactly the present: it arose on the foundation of Dr. Beresford, which was also by deed and with a clause of distress. His foundation was likewise of two fellowships and two scholarships in this college, by indenture tripartite, made the 12th of February, in the 11 H. 8, between the college, the dean and chapter of Lichfield, and himself, in consideration of 400l. given by him to the college: in which indenture a forfeiture was fixed; and a right of entry into the college lands given to the dean and chapter of Lichfield to distrain for it. Mr. Pegg was elected: Mr. Burton appealed to the bishop of Ely as visitor: Mr. Pegg protested against his jurisdiction. Civilians and common lawyers were heard on the question of the jurisdiction; the visitor pronounced for his own jurisdiction, and afterwards gave sentence for Mr. Burton, the appellant; and issued his monition to the master, president, and six senior fellows to admit him. The monition was obeyed; and Mr. Burton admitted into the fellowship, by the president; and by the latter a certificate of the admission duly returned to the visitor.

IN opposition to the visitor's jurisdiction, it was argued, that he could not be visitor as to the fellowships of the new foundation, unless specially appointed by the founder; which was not the case here; that Queen Elizabeth, who was subsequent to Dr. Keton, could not make regulations for his fellowships; which were not of the foundation of the countess of Richmond, under whom Queen Elizabeth claimed: that Dr. Keton might subject his fellows to the *then* subsisting rules of government of the college, but could not part with the right of visitation inherent in himself and his heirs, without plain and explicit words.

WITH respect to the clause of distress, it was said, there was a difference between superadding new fellowships to an old foundation, which was merely matter of donation, and thus *purchasing* two fellowships, which was a matter of contract: this remedy, it was argued, was not inadequate at the time when it was given; 13l. per annum being a large sum, in the 22 H. 8, and more than equal to the fellowships: but had it been inadequate, the founder had thought fit to accept it and require no more. This common law remedy was as effectual as any visitatorial power, and therefore would supersede it; for that was only founded on necessity, because no better could be had. But here the party injured might, on shewing his right in a court of equity, compel the church of Southwell to distrain; which would bring the right to be determined on an issue at law; and this being once determined for the candidate, the court of King's Bench would afterwards grant a mandamus to admit him. But if the bishop had a concurrent authority, *he* might judge one way, and the church of Southwell another; the jurisdictions might clash, and the college be ruined between them. With respect to Mr. Pegg's case, it was observed, that the proceedings took place in the vacation, when no recourse could be had to the courts of law.

LORD Mansfield delivered the opinion of the court to this effect;—that this was a question in which the interest of all the colleges, in both universities, was intimately concerned. It was impossible to foresee the tenth part of the mischiefs which would arise if they should succeed in this point. There was *no* college that was not involved in the question; were it decided in their favour, it would subject *some* of them totally to the King's courts.—There were
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in this college, thirty-two original fellowships, and twenty-seven on annexed foundations. He had been desirous to know, whether the form of ingrafting fellowships before the reign of Queen Elizabeth, was not usually by indenture, with a clause of distress, as in the present case. He had suspected, it took its rise from an analogy to tenure by divine service, which differed from frankalmoign in this, that it was certain, and that, if not performed, the donor or his heirs had, by common law, a right to distrain for it, whereas in frankalmoign he had no remedy, but to complain to the ordinary.—He had, therefore, enquired into most of the old foundations in both universities, and found there were few without some ingraftments, and those generally made by indenture, with a clause of distress. All ingrafted fellowships were on the same footing as the *old* ones, unless they were received on particular terms, by a special form of foundation, and a special manner of acceptance; and unless the new founder had ordained the contrary, the old visitor, as such, visited all annexed foundations. The mode of donation was, in all cases, the law of it. If Dr. Keton had appointed another visitor, and the college had accepted his donation on these terms, his visitor would have had jurisdiction. But he had directed that his fellows should be fellows of St. John's College, though of his foundation; he contracted, that they should have the same privileges and rights as other fellows; and they were, to all purposes, on the same footing with the rest, except in their proprietary rights. They were to be elected as other fellows, for there was no provision made as to the manner of voting for them: *that* was referred to the constitution of the college, as were also their age, learning, morals. If the college judged wrong, in these points, the visitor might review and reverse the determination. Dr. Keton's fellows

were moreover sworn to observe the statutes of the college, in other words, the statutes of the original foundation; for Dr. Keton had made none himself, nor could he have made any, *inconsistent* with those of the foundress. Had he by his *sole* authority appointed a fresh visitor, *that* would have been inconsistent with the statutes of the original foundation. But he had gone farther; and by disclaiming a power of making such inconsistent statutes, had shewn his intention, that his fellows should be under the same regulation and government, as the rest of the society: and the general visitor might proceed against either of them, as against the other fellows, even to expulsion.—But had there been nothing more in the deed than the naming of them fellows, they would, in that character, have become members of the corporate body, and subject to all the discipline and rules of the college, as had been observed in the case of the attorney general and Talbot (a).

As to the special remedy by distress, and proceeding on it in the King's courts, this would have very extensive consequences, and affect many cases beside the present, as several benefactors had followed the steps of Dr. Keton, by inserting the same clause. The remedy was, however, inadequate in point of value, and it was not given to the party injured; but to Dr. Keton's heirs and the chapter of Southwell. This remedy, and that by appeal, were remedies for different purposes: the appeal was a specific remedy to be applied by the visitor of the college; the distress, as in the tenure by divine service, was left to the common law; and there were many instances, beside these, where the remedy by distress did not take away the specific remedy.—On the whole he concluded, with the con-

(a) Ante, p. 253, 4, 5.

currence of the court, that the visitor was not excluded by the insertion of this clause (a).

THE jurisdiction of the visitor does not extend to a dispute between the college and a stranger. Thus if the college agree with a stranger to grant him a lease of the college lands, and refuse to perform the agreement, the remedy is by a bill in a court of equity for a specific performance, and not by appeal to the visitor (b).

So, where an estate is given to the college, as trustees, the visitor cannot take cognizance of the execution of the trust.

DR. John Bowton, a fellow of Saint John's college in Cambridge, by will, in 1689, devised to the master, fellows, and scholars of the college, and their successors, the perpetual advowson of a rectory on trust, that whenever the church should be void, and his nephew should be capable of being presented to it, they should present him; and on the next avoidance should present one of his name and kindred, if there should be any one of that description capable in the college; if none of that description, the senior divine then fellow of the college; and, on his refusal, the next senior divine, and so downwards; and if all should refuse, then any other person they should think fit. On the death of an incumbent, in May 1749, this living was offered to the senior fellow, and, on his refusal, to the next, till it came to the turn of Mr. Green, as next senior divine, who offered to take it; but Dr. Rutherford insisted, that he, being doctor in divinity, was to be considered as the person described by the testator, and appealed to the bishop of Ely, as visitor, who was of opinion, that Dr.

(a) Master and senior fellows of St. John's College, Cambridge, v. Toddington, Clerk, 1 Bur. 158. Rex v. Bishop of Ely. 1 Bl. Rep. 71.

(b) Vid. Rex v. Windham, Cowp. 378.

Rutherford was within the description of the will, and therefore required the college to present him ; and they, to avoid being censured, made a special presentation to him under their common seal. Green insisted, that as the advowson was devised to the college, under a particular trust, not by the founder, but by a third person, the visitor had no jurisdiction ; and therefore he filed a bill in chancery against the college and Dr. Rutherford, praying, that the presentation to the latter might be cancelled, and that the former might be directed to present him as intitled under the trust of the will.

DR. RUTHERFORTH put in a plea to the jurisdiction of the court, in which he stated the will and the statutes of the college ; that the bishop of Ely, for the time being, was visitor, and had power to determine exclusively all controversies about the construction of the statutes, and the right of presentation to livings, whether given by the original founder or by a subsequent benefactor ; that he had appealed to the visitor, and that the college had put in an answer to his appeal, but that the plaintiff had never appealed to the visitor to hear his claim : he therefore prayed the judgment of the court, whether he ought to be compelled to give any further answer to the plaintiff's bill, and whether the court ought to proceed further in the suit.

THE case was argued before Lord Hardwicke, chancellor, and Sir John Strange, master of the rolls, who, after having taken time to consider the question, delivered their opinion against the plea to this effect :—that this was not a purchase or general bequest of an advowson to the college, without any particular trust annexed, which, though coming after the appointment of a visitor, and from a person not the founder, would have fallen under the general regulations by which all other property of that nature was controlled.

trouled, and would have been equally the object of visitatorial power: but this was subject to a particular express trust, inconsistent with the regulations by which the other property was to be governed, and therefore standing on special circumstances peculiar to itself, was a proper subject for the jurisdiction of this court:—That the merits of the controversy depended on the construction of the will, and on the execution of the particular trusts contained in it:—That notwithstanding the antiquity of the will, the case was to be considered as it stood on the whole frame of the will, and from the death of the testator. At the time when the will was made the living was full, and therefore the testator could only direct what he would have done on the first vacancy. If on a vacancy, the nephew being capable, had offered to take the living, and the college had refused to present him, he might have had recourse to a court of equity, which would have compelled the execution of the trust: a *private* person would undoubtedly have been compellable to execute it; and in a matter of trust, it was of no consequence who were the trustees, private persons or a collegiate body; though the founder of the latter had given a visitor to superintend his own bounty, yet as between one claiming under a separate benefactor and those trustees for special purposes, the court would consider them as trustees only, and oblige them to execute the trust under the direction of the court.—They might have been compelled also to execute the next trust in the will to one of the name and kindred.—That which came under the next provision, was as express and special a trust as either of the other; with this only difference, that those trusts were at an end, whereas this was permanent, to be executed on every vacancy, and called, therefore, as loudly for the interposition of the court as either of the others. Had a
bill

bill been brought recently after the death of the testator against the heir at law, it must have been for two purposes; first to have the will declared, well proved and established against the heir, and all claiming under him; and then to have the direction of the court for carrying the trusts of the will into execution: the court would then have taken into consideration, what were the trusts and the directions proper to be given respecting them; and had this trust for the senior divine come under consideration, the court would have declared their sense of the words, and who it was that came under that description; and if afterwards the college had contradicted the judgment of the court, by presenting a fellow not within the description of the will according to that judgment, the court would not have endured such opposition, but would have relieved the injured party: so, if the college had been disposed to pursue the opinion of the court, but had been intimidated by the visitor, who put a different construction on the will, the court would have carried its own decree into execution. If this would have been the case on a recent application, there was nothing in the nature and reason of the thing why it should not be so now, though directions on this part of the trusts had not been prayed till wanted in this particular instance.—Allowing the bishop to have been appointed general visitor of the college by the founder, yet this being given on special trust, the visitor had no jurisdiction to determine who should be presented to this rectory, or to interpose in the execution of the trusts of this will. This would have been the case, had there been no inconsistency between the will and the statutes of the college; but when the nature of those statutes was considered, and, so far as the college livings were concerned, they were compared to the trusts of the will, it would appear that

that to judge by the statutes, which were the rule of the visitor, would be to counteract the intent of the testator, and to defeat the will: the members were sworn to obey the statutes on pain of amotion; but if an advowson was accepted by them on other terms, that must be considered as not within the compass of the oath: otherwise it must follow, that where there was a visitor, a subsequent benefactor could not be the regulator of his own gift.—A subsequent benefaction, indeed, might be put under the same power as those of the founder, and then the visitor would have an equal authority over them: but here the donor had given rules in his will, which were his statutes; he had not made the bishop his visitor, nor excluded the jurisdiction of this court by erecting another^(a).

THE bishop, as visitor of the dean and chapter, does not seem to have a jurisdiction to determine disputes between the members on the subject of their corporate property.

A STALL of a prebendary in the cathedral church of Durham had been vacant two years and a half. The other prebendaries had divided among them the intermediate profits. Dr. Sterne being appointed to the stall, insisted that he was intitled to them, and applied to the bishop, as visitor, for his determination on the subject. The bishop not considering this question as a subject of visitatorial power, refused to take cognizance of it, unless under the authority of the court of King's Bench. The subject coming before the court, Lord Mansfield said, he thought that an action at law was the proper method: that "whether the bishop could have a jurisdiction to determine this point; or whether matters of property in cathedrals could be determined otherwise than by the law of the land, was

(a) Green v. Rutherford. 1 Ves. 462.

a great *question*."—But in this particular case, the question must be litigated not only with members of the body, but with *executors* and administrators of deceased prebendaries; over whom the bishop, supposing him visitor, and as visitor to have conusance of such a case, could have no power; which alone was decisive against his jurisdiction in *this case (a)*.

WHETHER the bishop, as visitor of the dean and chapter, has a power to decide in matters of election to vacant stalls of the cathedral, is a question which does not seem to have yet received a general solution: but it has been determined that he cannot, by virtue of his visitatorial power, fill up a vacancy by lapse.

AN application was made to the court of King's Bench for a rule to shew cause, why a writ of prohibition should not issue to prohibit the bishop of Chichester from proceeding against the dean and one of the canons residentiary of the cathedral church, on his mandate directing them to admit George Metcalf, *clerk*, to be a canon residentiary.

THE suggestion on which the application was grounded, stated that the office of canon residentiary was an office of trust in matters ecclesiastical and temporal, and endowed with several tenements, rents, and profits; that previous to the year 1574, all the thirty-one canons of the church were residentiaries, when an ordinance was made to reduce the number to four beside the dean. That the right of election of a canon residentiary was in the dean and chapter, who themselves admitted, instituted, and inducted. That the bishop was not visitor as to such elections, nor had any visitatorial power or jurisdiction in that respect, nor had any right to appoint to the vacant place and office of a canon residentiary, by lapse or otherwise: that in

(a) Rex v, Episc. Dunelm. 1 Bur. 567.

March, 1784, the place of one of the canons residentiary became vacant by the death of Dr. Hurdis; that in August, the same year, the dean and chapter met to elect a successor, when there were two candidates; but the votes being equally divided, no election was made: that in October another meeting was held, when they were again equally divided: that the bishop, by his monition dated 4th of January, 1785, reciting these facts, and that, by reason of such failure in the election of a canon residentiary, the chapter was then incomplete, and the service of the church neglected, and that two of the prebendaries had appealed to him complaining of the proceedings, cited the dean and chapter to appear before him on a particular day, to submit to his visitation, and to shew cause why they had not filled up the vacancy occasioned by the death of Dr. Hurdis, and why the bishop should not by his power and authority, ordinary and visitatorial, fill up the said vacancy, by reason that the right of so doing had devolved upon him for that turn, by default of the chapter in not filling up the vacancy in due time: that by another mandate of the bishop, dated 19th of January, 1785, reciting that the dean and chapter not having shewn sufficient cause why he should not fill up the said vacancy, he had appointed Mr. Metcalf to be a canon residentiary in the room of Dr. Hurdis, he commanded the dean and chapter to admit Mr. Metcalf into actual residence; and that the bishop was still endeavouring to compel the defendants to admit Mr. Metcalf, notwithstanding their allegations against his right.

THE court (a) observed, that this was not a mere spiritual office, but a freehold attended with personal advantages, although the persons electing were indeed all eccle-

(a) Ashurst, Buller, and Grose, J.

fiastical; that whether the bishop had a right, as visitor, by ecclesiastical censures to compel them to do their duty and proceed to an election, was not the present question: that had that been the case, the court would not have hastily negatived that power; but he could not go further, and take the right of election out of the hands of the dean and chapter: that this case resembled one which frequently happened in the court of King's Bench: the latter had the power of compelling corporations to proceed to elections, which was in the nature of a visitatorial power, but they never assumed the power of appointing any person themselves, in case the corporation did not proceed to elect: that several points lately decided in this court with respect to this very church of Chichester, in a great measure determined the present question. It had been resolved, that a mandamus would lie to compel the dean and chapter to fill up a vacancy among the canons residentiary; and that on such a mandamus the court would compel an election at the peril of those who resisted; that the right of election was in the dean and canons; that the dean had no casting voice; that the canons had a right to vote by proxy; and lastly, that there was no lapse to the bishop in the case of a canonry.—It had been said that the bishop was not *bound* to apply for a mandamus: the court agreed he was not; but said that, if he made the application, they were bound to attend to him, and that it was not clear that a mandamus would not be granted on the application of any other person.—On these principles they granted the prohibition (a).

BUT though the bishop as visitor cannot appoint to a vacant place in a cathedral, in default of those who have

(a) 1 Term Rep. 650. Bishop of Chichester v. Harward and Webber.

the right of election ; yet he may in his *general visitation*, by virtue of his *general visitatorial power*, deprive a canon or prebendary for incontinency or other offences described in the statutes ; and though these appoint some preliminary forms to be observed, as that he shall be thrice admonished before *application* be made to the bishop for the purpose of his removal, yet the bishop may of his own authority *in his visitation*, without these preliminary forms, deprive him (a).

THOUGH the visitor of a *college* have a jurisdiction over matters of election, he has no right to appoint to a vacant office in default of the electors ; and if the statutes, in default of an election by the college, by express provision give the appointment to the same person who is general visitor, he has that appointment not as visitor, but by virtue of that express provision.

By the statutes of Peterhouse College, in Cambridge, the bishop of Ely was appointed general visitor. The statute which described the qualifications of the master had this clause. “In cujus electione, hoc imprimis observari volumus, ut ipsius *domus* atque sociorum ejusdem semper ratio habeatur ; ut hi, si qui inter eos ad hoc munus obeundum inveniantur idonei, cæteris preferantur ; si hujusmodi in domo nulli extiterint, tum aliunde assumantur.” It then directed that two should be presented to the bishop of Ely, who should choose between the two. The statute “de electione magistri” directed, that the two, chosen in the manner therein particularly prescribed, should be presented without delay to the bishop of Ely for the time being, if the see should be full, or, in the vacancy of the see, to the guardian of the spiritualties ; that the bishop or the guardian, in these respective cases, should

(a) Rex v. bishop of Chester. 1 Wils. 206. 1 Bl. Rep. 22.

nominate one of the two to be master; but that they should *give full faith to the return of the college*: it also provided, "that if all the fellows, or the greater part of them, should not agree in the first scrutiny, then they should proceed to a second and a third scrutiny, until two, *in the manner aforesaid*, should be nominated to the office of master; but that if in the third scrutiny, which was to be held within three days from the first day of the election, then he whom the bishop of Ely, or in the vacancy of the see, the guardian of the spiritualities should esteem fit, should be appointed master."

ON a vacancy of the mastership in 1787, a day was appointed for an election according to the directions of the statutes. Three candidates offered themselves, George Borlase, B. D. Daniel Longmire, B. D. and Francis Barnes, B. D. Mr. Borlase was at that time a fellow of the college; Mr. Longmire had been a fellow of it, but had vacated his fellowship by accepting a college living in the year 1776, notwithstanding which, however, he had continued his name on the boards of the college: Mr. Barnes was vice provost of King's College, and had never been a member of Peterhouse.—On the day appointed for the election, eleven of the fellows, being the whole number but one, assembled in the chapel, and proceeded to the election according to the forms prescribed by the statutes: all of them nominated Mr. Borlase, eight nominated Mr. Barnes, and three of them Mr. Longmire. Previous to the day of election, neither the senior fellow of the college nor Mr. Longmire knew that Mr. Barnes was to be a candidate. The majority of votes, however, being declared to be in favour of Mr. Borlase and Mr. Barnes, the senior fellow pronounced them to be nominated and elected by the fellows of the college to be presented to the bishop of Ely:
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on the same day letters under the common seal of the college were made out in testimony of the election, nominating and presenting Mr. Borlase and Francis Barnes to the bishop, requiring him to appoint one of them to be master of the college; the letters were delivered to the bishop by two of the fellows, who requested him to make an immediate appointment, informing him that the two persons nominated were at hand, and that the preference of the society was in favour of Mr. Borlase. The bishop, finding that a person from another college was presented to him, was induced to make some enquiries into the reason of it, and whether there was any other person of the college beside Mr. Borlase; on which he was informed by one of the fellows, that there was no other person qualified among themselves, and that they had obeyed the statutes. Conceiving that he could not properly discharge his duty, as visitor of the college, without maturely considering the statutes, he declined at that time to make any appointment of either of the persons nominated to him. Five days after this, Mr. Longmire and the senior fellow represented to the bishop, that Mr. Longmire had been a candidate; that he had had three votes, and that he was qualified according to the statutes, and had never ceased to be a *member* of the college, though his *fellowship* had been vacated by the acceptance of a college living; for which reason he conceived himself within the meaning of the preference given by the statutes to persons of the college over strangers. The bishop, after maturely considering the statutes, thought Mr. Longmire entitled to the preference claimed by him, declared the return of Borlase and Barnes null and void, as not being in his judgment made agreeably to the statutes, and by an instrument under his hand and episcopal seal, appointed Mr.

Longmire to be master of the college, by virtue of the authority given him by the statutes, and in right of his *visitatorial* power. Mr. Borlase and two other fellows formally protested against this appointment, as being in their judgment contrary to the statutes, and contrary to the sense and practice both of the college and of its visitors in former elections : their protest having no effect, they applied to the court of King's Bench for a rule calling on the bishop to shew cause, why a mandamus should not issue directed to him, commanding him to appoint one of the two persons presented to him to be master of the college.

THESE facts and the statutes which were thought to be material being laid before the court, three questions were made. First, Whether this was a proper object of the bishop's visitatorial authority. Secondly, Whether he had, in the present case, acted as visitor. And Thirdly, Whether the interpretation which the college had given to the statutes was the true one ?

ON the first question, the court observed that there was no doubt but the founder had constituted the bishop of Ely general visitor ; but he had a right to restrain him in particular cases, if he thought proper ; and then he was not visitor as to those particular cases. This was a case of that kind ; the only power which the bishop could exercise, was that of judging of the comparative fitness of the two persons nominated by the fellows. From the tenor of the statute "*de electione magistri*," it evidently appeared to have been the intention of the framers of it, that the fellows should judge of the fitness of the respective *candidates* ; and every precaution had been taken that they should not elect any but those who were properly qualified, by obliging them to take a solemn oath,
not

not to nominate any person out of favour or affection. The legislator having intended to give that power to the fellows, had by this statute expressly excluded the bishop from interfering in their choice. He was required to give full faith and credence to their nomination; so that he was only to act ministerially; or at most he had only a discretion left him as to preferring one of the two; beyond that he was restrained by the statutes. He had no right to appoint, in this instance, as visitor; his authority arose under an express designation in the statutes, and he must take it as it was there given him; which was only in case the fellows on the third scrutiny did not agree on two persons to be returned to him; and it was further provided, that if the see should be vacant, the guardian of the spiritualties should have the same power of appointment; which was an additional proof that this had no connection with the visitatorial power; as the guardian of the spiritualties was clearly not visitor.

ON the second question, it was equally clear, that the bishop had not acted, in the present case, in the character of visitor. The exercise of a visitor's power, was a judicial act; and a judge could not determine without hearing the parties concerned. So that had this been a proper object of the visitatorial power, he ought to have exercised it in a formal manner, and ought at least to have convened the parties interested to give them an opportunity of making a defence. But the very *form* of the appointment of Mr. Longmire decided, that it was made in *pleno jure*. In this he asserted a right vested in him by the statutes by reason of the nullity of the election, and proceedings of the fellows in not presenting two persons properly qualified.

THE third question depended on the meaning of the word "*domus*," in the statute which prescribed the quali-

fications of the master: on one hand it had been contended, that it described only those who were at the time of the election *members of the foundation*; on the other, that it extended to all those whose names continued on the *boards* of the college, which was the case of Mr. Longmire.—The court, after a very elaborate argument, and examination of all the parts of the statutes in which this word occurred, agreed, that it was to be taken only in the former sense, and consequently, that the college had given the true interpretation to the statutes.—The mandamus was consequently granted (a).

THE power of the visitor is confined to offences against the *private* laws of the college; he has no cognizance of acts of disobedience to the general laws of the land.

By the statute of 1 W. and M. made for the abrogating of the oaths of supremacy and allegiance, and appointing others in their place (b), it was enacted, “that if the master, governors, head, or fellow of any college or hall, in either of the two universities, should neglect to take the oaths, by the act appointed, in such manner and before such persons as by the act directed, before the first of August, in the year 1689, he should be suspended from his office for the space of six months, to be reckoned from the said first of August, and if within that time he should not take the oaths in the same manner, and before the same persons as he ought to have done before that day, his office or place should be void.

SEVERAL fellows of Saint John’s College, in Cambridge, had not taken these oaths within the time prescribed, and a mandamus had issued from the court of King’s Bench, directed to Humphrey Gower, the master

(a) *Rex v. Bishop of Ely*, 2 Term Rep. 290—345.

(b) 1 W. and M. st. 1, c. 8, s. 8.

of the college, commanding him to remove those fellows. On the return to this mandamus, one principal objection to the writ was, that there was a visitor who ought to take cognizance of the matter. But the court, on the principle above stated, said, that this was not a proper subject of the visitatorial jurisdiction, and therefore that it was proper for the interposition of the King's courts (*a*).

If the visitor exceed his authority, a prohibition will lie to prevent him; this is manifest from many of the cases already cited on other points (*b*).

If the visitor proceed on a citation, professedly founded on an authority, which it afterwards appears he did not possess, it seems his whole proceedings are void, though he might have taken cognizance of the same subjects under his general visitatorial authority.

THUS, in a declaration in prohibition by Dr. Bentley, against the bishop of Ely, visitor of Trinity College, Cambridge, a citation was set forth, commanding Dr. Bentley to appear before him, the "said bishop of Ely, visitatorem *specialiter* assignatum et sufficienter autorisatum vigore *statutorum* per *Elizabetham* quondam hujus Regni Regiam sub sigillo suo magno, magistro, sociis et scholaribus collegii sacro sanctæ et Individuæ Trinitatis infra universitatem Cantabrigiæ *representatorum* et *commendatorum*, ad examinandum Magistrum Collegii prædicti de et super criminibus et excessibus in secundo membro capitis quadragesimi dict. statut." at such a time and place, then and there to answer to certain articles concerning the maladministration of his office. — In a preceding part of the declaration, the statute to which this citation alluded, was

(*a*) Rex et Reg. v. St. John's College, 4 Mod. 233.

(*b*) Vid. Fitz. 108, 305, et seq. 1 Will 206. 1 Bl. Rep. 22. 1 Bl. Rep. 158. 1 Term Rep. 650.

set forth, which on argument was decided not to have created the bishop of Ely special visitor, but to have supposed him *general* visitor already, and only to have introduced some new regulations to be observed in the particular case mentioned in the statute. The bishop pleaded a statute of Edward the fourth, which constituted him *general* visitor, and would have supported him in what he had done, and he founded his proceedings on it: but Lord Raymond, delivering the opinion of the court, observed, that the single question was, "whether the citation was well founded;" for as that was the leading process, and the sole basis of all the subsequent proceedings, if it should appear not to have been warranted by any legal authority in its first emanation, whatever was done subsequent to it, was without jurisdiction. The citation, or rather the power of issuing it, as here claimed, was expressly founded on the fortieth chapter of the statutes of Queen Elizabeth, by which, as it was alleged, the bishop was *special*ly constituted visitor to examine the master, &c. but as it appeared, that the bishop was *not* appointed visitor by this statute, it followed, of his own shewing, that the citation was ill founded, and therefore he could not proceed upon it, let him have whatever other power or jurisdiction he might (a).

It was formerly doubted, "whether, if the visitor refused to receive and hear an appeal, the court of King's bench would compel him by mandamus."

(a) Bentley v. bishop of Ely, Fitz. 310, 11, 12, 1 Barnard K. B. 192. Fortesc. 298. 2 Str. 912. In the two latter books, it is said, the judgment was afterwards reversed in the house of lords on a writ of error; and the prohibition was ordered to stand as to many, and a consultation awarded as to many of the articles exhibited before the bishop against the doctor.

THE first case we find on this subject is that of Mr. Usher, a fellow of University College in Oxford, who having been expelled from the college, wished to appeal to the vice-chancellor and convocation, as visitors; but they having refused to receive the appeal, he was advised to apply to the court of King's Bench for a mandamus to compel them: on the application being made, some doubts were started as to the point of fact, whether they were visitors; and the court desired the statutes to be laid before them, and said they would consider of the propriety of granting the mandamus: but it does not appear what was the event (*a*).

IN a case, which occurred in the 9 G. 2, Lord Hardwicke is reported to have said, that "he did not know any instance of the court's having granted a mandamus to a visitor to execute his power, though at the same time he did not know but the court might do so, for it was a kind of jurisdiction (*b*).

IN the 23 G. 2, an application was made to the court on behalf of Dr. Vernon, for a mandamus, to be directed to the bishop of Ely, commanding him to hear an appeal made to him as visitor of Trinity College, Cambridge, by the doctor, who complained, that he had been wrongfully deprived of his senior fellowship of the college. The application was founded on affidavits, that the bishop had declined hearing the appeal, until he should be satisfied that he had a *right* to visit the college.

ON shewing cause, Doctor Vernon grounded the bishop's right to visit, on a body of statutes given to the college by Edward the sixth, in which, among other things, the bishop of Ely, for the time being, was appointed

(*a*) Usher's case, 5 Mod. 452. 11 W. 3.

(*b*) Dr. Walker's case, B. R. H. 212.

to be visitor; and Doctor Vernon swore that he believed these to be the statutes which were binding on the college.

On the other side, it appeared to the court, that these statutes had never been put in execution; that the bishops of Ely, for two hundred years past, had not visited the college; that these statutes were no where inrolled; that another body of statutes was given to the college by Queen Elizabeth, in which no notice was taken of those of Edward the sixth, although, in many respects, contradictory to them; that all the members of the college took an oath, that they would observe the statutes of Queen Elizabeth; and that neither the book of the statutes of Edward the sixth, nor any copy of it, was to be found among the archives of the college.

THE court observed, this was a controverted question, and that it was not at all clear to them *who* was visitor? They declined giving an opinion, whether a mandamus ought to be granted in any case whatever to hear an appeal; the question had never been determined; Usher's case came nearest to the present, in which the most eminent counsel at the bar were concerned; but though the court had been moved several times, yet at last nothing was done in it.—It was well known the court could not grant a mandamus to compel any person to exercise a jurisdiction, to which he was not most clearly appointed, and which he was not bound by the law to exercise. In the present case, if a mandamus were granted, it must be on the supposition that the bishop was visitor; this supposition might be false; and then if the writ were granted, and the right of visitation should afterwards be found to be in the crown, the attorney general might come for a prohibition; so that the court would be acting most absurdly, by commanding
and

and prohibiting a man to exercise one and the same jurisdiction (*a*).

It is now, however, determined, that where there is no doubt about the person of the visitor, the court will grant a mandamus to compel him to receive the appeal. This was determined in the case of the bishop of Lincoln, in which a mandamus was prayed to be directed to him, as visitor of Lincoln College, in Oxford, to compel him to receive, hear, and determine an appeal of Dr. Halifax, who complained of an undue election to the office of rector of that college, to which Mr. Horner had been admitted. The court determined, that where by the statutes of a college a visitor was appointed, and an appeal was lodged with him, they would compel him to hear the parties, and form *some* judgment; though they would not oblige him to go into the merits of the complaint, but that it was sufficient if he decided, that the appeal came too late (*b*).

BUT where the visitor has actually executed a sentence of expulsion; though he may appear to have exceeded his jurisdiction, a mandamus will not lie to restore the party expelled, for that would be to command the visitor to reverse his own sentence (*c*).

THE party, however, against whom the sentence has been executed, may have a remedy by ejectment (*d*); or he may, it is said, have an action for damages against the visitor (*e*).

WHEN the visitor has pronounced a sentence, which by the statutes of the college a particular officer is to put

(*a*) Rex v. bishop of Ely, 1 Wils. 266. 1 Bl. Rep. 52.

(*b*) Rex v. bishop of Lincoln, 2 Term Rep. 338—in the notes.

(*c*) Brideoake's case, H. 12 Ann, cited 1 Wils. 209. 1 Bl. Rep. 25, 26, in Rex v. bishop of Chester, and 1 Bl. Rep. 58, in Rex v. bishop of Ely.

(*d*) Per Lee C. J., 1 Wils. 209.

(*e*) 1 Vel. 470.

in execution, the court of King's Bench will not compel that particular officer by mandamus, to do his duty ; because that would be to interfere with the privilege of the visitor, who has power to compel the proper person to execute the sentence : but it seems doubtful, whether, if the visitor himself refuse to compel the execution of the sentence, the court will grant a mandamus directed to him for that purpose.

By the statutes given by Queen Elizabeth to Trinity College in Cambridge, it was ordained, " that in case the master should at any time be examined before the visitor, the bishop of Ely, and be lawfully convicted before him of dilapidations of the goods of the college, or violation of the statutes, he should, without delay, be deprived of his office by the vice-master, and that without appeal." One of the fellows of the college promoted a suit against Dr. Richard Bentley, the master, before the bishop of Ely, among other things, for dilapidation and violation of the statutes, in which several articles were exhibited against Dr. Bentley for that purpose ; a prohibition was granted by the court of King's Bench, prohibiting the bishop to proceed, on the ground, that he was acting beyond his jurisdiction ; on a writ of error to the house of lords, a consultation was awarded, as to such articles as related to the dilapidations and violation of the statutes (a) : the bishop then having considered the evidence on both sides, adjudged, that the doctor was guilty, and had incurred the penalty of deprivation of his office. Dr. Walker, the vice-master, on application to him to execute the sentence, refused, on which a mandamus was directed to him, commanding him, without delay, to deprive Dr. Bentley, or to signify cause to the contrary.

(a) Vid. ante, p. 278.

The writ recited, that the college was founded by Henry the eighth; that Edward the sixth had given it a body of statutes, by which among other things, it was ordained, that the bishop of Ely should be visitor; and that Queen Elizabeth had given *other* statutes, among which was one to the effect before mentioned; and then recited the preceding facts.

DR. Walker, in his return, alleged, that the statutes of Edward the sixth, by the acceptance of those of Queen Elizabeth, were cancelled, and particularly, that the statute, by which the bishop of Ely was constituted *general* visitor of the college, was abrogated and made void, and that no other statute was granted by the said Queen, or by any of her successors, by which the vice-master was subject to any visitatorial power, other than that of the Queen and her successors, as *general* visitors of the college. He then stated the proceedings of the bishop as *special* visitor of the master, and alleged, that the King was *general* visitor of the college, and in that character had undoubted authority to cause the sentence of deprivation to be executed.

LORD Hardwicke observed, that if the bishop was to be taken to be general visitor, as the writ suggested, it destroyed itself, for then the vice-master was only a minister to put his sentence in execution, and a mandamus had never issued to an *officer* of an inferior court to compel him to do his duty; for that if he refused to do it, the judge might deprive him of his office. The same objection applied, if the King was visitor, as was suggested in the return: if the bishop was visitor, he might visit and remove, or punish the vice master, and the court could do no more; and if the King was visitor application might be made to him to visit; so that in neither case was it proper to award a peremptory mandamus (*a*).

(*a*) Dr. Walker's case, B. R. H. 212.

AFTER this determination, an application was made to the bishop, complaining of Dr. Walker's refusal, and requesting him, as *general* visitor, to compel Dr. Walker to execute the sentence, which the bishop had pronounced as *special* visitor; which the bishop refused to do. On this an application was made to the King's Bench for a mandamus to be directed to the bishop, commanding him to compel Dr. Walker to execute the sentence. On this Lord Hardwicke observed, that a mandamus could not properly be directed to one man, commanding him to compel another to do an act: but, however, a rule was granted, calling on the bishop to shew cause, which, after much argument, was discharged, principally on the ground, that it was not clear whether the bishop or the King was general visitor (a).

THOUGH it be a general rule, that where there is a visitor, no mandamus lies to compel the execution of any thing within the visitor's jurisdiction, yet that rule does not apply where the visitor is himself the party who is to do the act required; or, in other words, where the same person who by one office is to do an act, is, in another right, also visitor.

THE Collegiate church of Manchester was founded and made a body corporate, by Charles the first, in the eleventh year of his reign, and the bishop of Chester, for the time being, was appointed visitor: George the first allowed the then bishop of Chester to hold the wardenship of the Collegiate Church in *commendam*: in the first year of George the second, a mandamus was directed to the bishop as warden of the college, commanding him to admit Dr. Ashton as chaplain. The bishop returned the

(a) Rex v. bishop of Ely, Andr. 176.

foundation, and his appointment as visitor. The court considered this as an exception to the general rule, for the two offices of visitor, and of the person who was to do the act, being united in the same person, it was clear, he could not visit himself; his power as visitor was suspended. That the visitatorial power might be extinct or be suspended was evident from the common question which was always asked on an application for a mandamus in such cases, "whether there was a visitor?" which could only be applied to suspensions or extinguishments of the authority, because in all eleemosynary foundations there must necessarily have been a visitor at the foundation: it remained, therefore, to be enquired, whether any body else but the bishop could visit in this case; the King could not, for he had transferred his whole power to the bishop, and it never yet had been decided, that on a *temporary* suspension of the visitatorial power, it resulted back to the founder or his heirs; and in this extinction, or suspension, there was no inconvenience, as recourse might be had to the court of King's Bench (a).

IN consequence of this judgment was made the statute 2 G. 2, c. 29, which, after reciting the foundation of the college, and that the bishop of Chester, on account of his being warden of it, could not exercise the power of a visitor; and likewise *that some doubt had arisen, whether the King could visit the said church during the suspension of the then bishop of Chester's power*, enacted, "that during such time as the wardenship of Manchester was or should be held in commendam with the bishopric of Chester, the power of visiting the Collegiate Church

(a) Rex v. bishop of Chester, 1 Barnard, K. B. 51. 2 Str. 798.

was and should be vested in the crown; and that his Majesty, his heirs and successors, Kings of Great Britain, had, and should thereby have full power and authority to visit the said Collegiate Church, according to the tenor of the charter of its foundation."

BUT by s. 3, it was provided, that if any dispute or question should arise concerning the election or admission of any of the then present members or officers of the college, by reason of their not being elected or admitted within the time limited by the charter, these should be determined by the course of the common law, and not otherwise, in such manner as if no visitatorial power were in being.

WHEN no visitor has been appointed by the founder, and the heirs of the latter are extinct, it has been made a question, whether the visitatorial power devolves personally on the King, or belongs to the court of King's Bench, by virtue of its general superintending authority.

ON an application to the court of King's Bench, in the time of Lord Chief Justice Holt, the latter is reported to have said, "I take this to be altogether a lay corporation, and then the visitation belongs to the founder and his heirs; and if he die without heirs, I take it the visitation shall go to the King; and this is my private opinion" (a); and in support of this opinion he referred to a case in the year books in the time of Edward the fourth (b).

IN the 12th of G. 3, the same point was incidentally mentioned in the case of the King and Gregory, which

(a) 12 Mod. 232.

(b) Simon de Monford's case, 5 Ed. 4, long. quint. 123.

was a rule to shew cause, why an information, in the nature of quo warranto, should not be exhibited against the defendant, to shew by what authority he claimed to be a fellow of Trinity Hall, in Cambridge: the application was founded on the circumstance that no heir of the founder was known to be alive. In the course of the argument some objections had been taken to the mode of application, and it had been contended, that the power of visiting devolved to the King in Chancery, as in the case of a charity; to which Lord Mansfield answered, "that the foundation was not a charity, and that the power of superintending it did not go to the King as visitor; but it was a corporation, and therefore the right devolved to the crown to be exercised by the court of King's Bench. The case of Manchester College," he said, "was very strong to this point; for that there, so long as the suspension of the visitatorial power lasted, it was the same as if there had been no visitor, and the King in this court proceeded upon this ground. The statute of Geo. 2, was likewise very material; for as this court had exercised the ordinary visitatorial power, that act made the King visitor of the college, but had provided, that if any question concerning the election or admission of the members at that time should arise, the decision should be in this court" (a).

BUT it has been lately decided, that, in case of the failure of the heirs of the founder, when there has been no visitor appointed by the latter, the right of visitation devolves to the crown, to be exercised by the Chancellor.

A RULE having been granted, calling on the master and fellows of Saint Catherine's Hall, Cambridge, to shew cause why a mandamus should not issue, command-

(a) *Rex v. Gregory*, 4 T. Rep. 240, in the notes.

ing them to declare the fellowship of the reverend Joshua Wood vacant, and to proceed to the election of another fellow; it appeared, that the college was founded by Dr. Wodelarke, who gave it certain statutes; that the foundation was confirmed and incorporated by letters patent, in the 15th year of Edward the fourth; that no visitor had been appointed by the founder, and that his heirs were extinct.—The ground of the application was, that Mr. Wood had accepted a college living, which it was contended vacated his fellowship.—The principal question was, “whether in this case the visitation belonged personally to the King, or to the court of King’s Bench?”

LORD Kenyon, in delivering the opinion of the court, observed, that the principle on which Lord Mansfield proceeded in the case of the King and Gregory, and which might not improperly be introduced in cases of this kind, was a wish to adapt the administration of justice to the convenience of the parties, not indeed so as to controul the law, but as a guide in doubtful cases, where there was no express decision on the question. It was highly convenient that all disputes of this kind should be decided in a domestic forum; and if this observation was entitled to much weight in the case of Saint John’s College against Toddington, it certainly merited the same attention in the present.—The right now claimed, could not be said to escheat; this was to misapply the word, which in an appropriate sense belonged to estates held by tenure, in which, on failure of heirs of the donee, the estate reverted to the donor.—But there were several kinds of property which belonged to the King, when there was no other person to take them; as in the instance of all goods, of which no particular owner was to be found: there was, therefore, nothing

nothing incongruous to the general principles of law, in saying that this power, which, at the time when the charity was founded, was vested in somebody, should now, when there was no other person to claim it, devolve on the King, to be exercised as nearly as possible in the manner in which it was exercised by the founder and his heirs. This power, though not expressly reserved to the King by the founder, yet belonged to him by operation of law.—The great authority against this opinion, and which weighed most in the mind of the court, was what was said by Lord Mansfield in the case of the King and Gregory: but of that it was sufficient to say, that it was not the point in judgment before the court; his lordship's attention was not particularly called to it; and it was an opinion by which he would probably not wish to be bound.—With respect to the case of Manchester College, and the act of parliament which was passed in consequence of that determination, the conclusion from them seemed to be the contrary of that which had been drawn from them; it had been contended by the counsel, in support of the jurisdiction of this court, that the last clause of that act was at variance with the first, and abridged the construction of it. The first clause enacted, that when it should happen that the wardenship of Manchester College should be held in commendam with the bishopric of Chester, the power of visiting the college should be vested in the crown; and it enabled the King to visit it according to the charter of foundation: that power of visitation then must be exercised by the King in his court of Chancery.—If that clause had stood alone, it would not have assisted the argument in favour of the present application; because the court must suppose that the legislature intended in that case to follow as nearly as possible the course of the common

law; and under that act the King could not exercise his visitatorial power in this court. With respect to the latter clause controlling the first, it must be observed, that though it provided that disputes concerning the election of members should be determinable by the course of the common law, as if there were no visitatorial power in being, yet that regarded only the case of the *then existing members*, and left the power of visiting in other cases in the chancellor, cautiously avoiding to stir the question relative to the propriety of granting the mandamus, which gave rise to the act. These two authorities, which had been urged in favour of the present application, being answered to the satisfaction of the court, the only questions left for their consideration were the convenience of the case, and the general law on the subject. In general, corporate bodies, which respected the public police of the country, and the administration of justice, were better regulated under the superintendence of this court than that of the court of Chancery; but it was otherwise in general with eleemosynary foundations. What had been said by Lord Holt seemed decisive of this question; for though it was only called his private opinion, yet, as it was formed by him on a subject which he had so thoroughly considered, and as the general convenience of the case coincided with it, it was entitled to the greatest weight. "Therefore," concluded his lordship, "with no decided authority, or general principle of law against us, but with the convenience of the case and general principles of law in our favour, we shall do more substantial justice to the parties in this particular case, and to the public in general, by refusing to grant this writ of mandamus, and by referring this question to the Lord Chancellor, than by entertaining jurisdiction over it" (a).

(a) *Rex v. Master, &c. of St. Catherine's Hall, Cambridge.* 4 T. Rep. 233.

SECTION II.

Of the Writ of Mandamus.

A MANDAMUS is defined to be a prerogative writ flowing from the King himself sitting in the court of King's Bench, superintending the police and preserving the peace of the country (*a*). The purpose of it is to command the person to whom it is directed, to do something which, it is supposed, he is bound by his duty to do.

THESE writs are said to be very ancient; even as old as the time of Edward the first, if not older, though it is said they were originally no more than letters, and that for a considerable time, disobedience of them was only a contempt (*b*).

THE first *judicial* writ of mandamus has been said to have been that in James Bagg's case (*c*): but that is certainly not correct; for in the sixth of Edward the second (*d*) it appears, that a writ issued, directed to the mayor and commonalty of Bristol, commanding "that, whereas they had deprived certain persons of the liberty of the city, they should restore them under pain of all that they could forfeit."

IN the reign of Henry the sixth, a writ of the same kind was directed to the mayor of London: it recited that one Richard Anable, of London, pewterer, who had been duly admitted to the freedom and franchise of the city, and had long enjoyed, within the city, the freedom and privi-

(*a*) Pr. Lord Mansfield, 1 Bl. Rep. 352.

(*b*) Vid. Fortesc. 204. 1 Str. 540. 4 Bur. 2189.

(*c*) Vid. ante, p. 50.

(*d*) Close Roll. membr. 8. Dyer, 382, in marg.

justice, in favour of the officer, refused to dismiss the information, which prevented the owners from having their brandy returned; on an application for a mandamus to compel him to determine the matter, it was granted (*a*).

So, the court granted a mandamus in the nature of a *procedendo ad judicium*, commanding the judge of the court of Sandwich, to give judgment on a verdict, he having granted a new trial for excessive damages, without payment of costs (*b*).

So, it has been granted to the sheriffs of London, commanding them to give final judgment on a writ of inquiry (*c*).

It has been granted to the justices of peace, of the county of Chester, commanding them to make a rate, to reimburse a surveyor of the highways, the money he had expended on that account (*d*). But it has been refused to justices to make a rate to reimburse two of the inhabitants their charges incurred in defence of an indictment for not repairing a bridge (*e*).

If an overseer of the poor disburse money out of his own pocket for the relief of the poor, and go out of office without having reimbursed himself out of the money in his hands, he cannot afterwards have a mandamus to compel the succeeding church-wardens and overseers to make a rate to reimburse him; for the rate must be made for the relief of the poor, and not to reimburse the overseers: there is no necessity that they should pay money out of their pockets, for the church-wardens and overseers with

(*a*) 1 Str. 530, 531.

(*b*) 1 Str. 113, where 1 Vent. 187. T. Raym. 214, and 2 Keb. 871, are cited as authorities for the mandamus.

(*c*) Str. 392—vid. 1 Ventr. 187, 8.

(*d*) Haffel's case, Str. 211.

(*e*) Anon. Str. 63, vid. Str. 41, 93.

the concurrence of the justices may order a sum of money to be levied for the relief of the poor, without the concurrence of the parish: it is not material indeed, whether the money be disbursed before or after a rate made, and if they lay out money before, they may reimburse themselves out of the money levied on such rate (*a*).

By the st. 43 El. c. 2, s. 1, the overseers of the poor are to be nominated under hand and seal of two or more justices of the peace in the county, dwelling in or near the parish or division for which they are to be appointed.

By the st. 13 and 14 Car. 2, c. 12. if the parish be too large to reap the benefit of the statute of Queen Elizabeth, overseers are to be appointed for each of the separate townships or villages into which the parish is divided.

If either in the case of the parish at large, or of the separate townships or vills, the justices refuse to appoint overseers according to these statutes, they will be compelled by mandamus (*b*).

A MANDAMUS lies to compel the church-wardens and overseers to make a rate for the maintenance of the poor; but does not lie to compel the insertion of particular persons in the rate, or to make an *equal* rate, because in the two latter cases there is another specific remedy, by appeal to the sessions (*c*).

It does not lie to compel justices of the peace to grant a licence to keep an ale-house, for it is discretionary in the justices to grant it or not (*d*).

So, a mandamus has been refused to compel the church-wardens and overseers to sign a certificate, the court observing, that the motion was a very strange attempt, on

(*a*) Tawney's case, 2 Ld. Raym. 1009, cited 2 Bur. 1153, 1157.

(*b*) Vid. Burn's Justice, Overseers of the Poor.

(*c*) 2 Str. 1259. 4 Bur. 2290.

(*d*) 2 Str. 881.

the ground, I suppose, that to grant or not to grant the certificate, was discretionary in the church-wardens and overseers (*a*).

It has been refused to church-wardens, commanding them to call a vestry for the election of new church-wardens; the court observing, that there was no instance of such a mandamus, and that they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed (*b*).

A MANDAMUS lies to justices of peace, commanding them to make out a warrant of distress to levy the poor's rate (*c*).

So, to swear an overseer to the truth of his accounts according to the statute of 17 G. 2, c. 38, s. 1 (*d*).

So, to appoint surveyors of the highways out of a list returned to them on the part of the parish, according to the directions of st. 7 G. 3, c. 42, s. 1 (*e*).

So, to put in execution the statute of forcible entry (*f*).

So, to two justices to compel them to inquire whether a parish stands in need of assistance from other parishes, for the relief of the poor; or where it appears, that the parish is actually in want of it, to compel them to make a rate for that purpose (*g*).

BUT if the parish, which applies for relief to *country* justices, be within the exclusive jurisdiction of a borough, a mandamus will not lie, because they have no means of enquiring into the justice of the complaint (*h*).

It lies to two justices to proceed and give judgment in a complaint depending before them, of which an act of parliament gives them jurisdiction (*i*).

(*a*) Burn's Justice, Poor, Certificate.

(*b*) 1 Str. 686.

(*c*) 1 Wils. 133.

(*d*) 1 Wils. 125.

(*e*) 4 Bur. 2452.

(*f*) 1 Barnard, K. B. 72, 82.

(*g*) 4 Term Rep. 782.

(*h*) Id. ibid.

(*i*) 1 Wils. 21.

So, to the justices in quarter sessions to receive an appeal which they are required by act of parliament to receive (*a*).

So, to *hear* an appeal which they had adjourned (*b*).

So, to receive and proceed on a traverse to a presentment made by a justice of peace upon view, for not repairing a highway (*c*).

It lies to a visitor to receive an appeal and give some judgment (*d*).

It lies to commissioners of excise to grant a permit, if a proper case be laid before the court for that purpose (*e*).

It lies to the master of a college, commanding him to affix the corporation seal to an answer of the fellows to a bill in chancery (*f*).

So, to the keepers of the common seal of the university of Cambridge, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in senate (*g*).

So, it lies to the mayor of a corporation to compel him to put the corporation seal to the certificate of the election of a recorder, where by the constitution of the corporation the mayor is bound to certify the election to the King for his approbation (*h*).

It lies to the lord of a leet to administer the usual oath to a person elected portreeve of a town (*i*).

So, in general it lies to swear in a person who has been elected or appointed to an office; as to swear in an

(*a*) 3 Term Rep. 150. 4 Term 489. (*b*) Sayer 282.

(*c*) 3 Bur. 1530. (*d*) Ante, p. 281, and 1 Bur. 567.

(*e*) 2 Term Rep. 381. (*f*) Cowp. 377.

(*g*) 3 Bur. 1648—1663. (*h*) 4 Term Rep. 699.

(*i*) 2 Rol. Rep. 82, 85.

ale-taster, where it appears, that this is a previous requisite to his being chosen portreeve, who is the returning officer for members of parliament (*a*). So, to swear in a director of the amicable assurance company, which is a corporation created by charter from the crown (*b*).

So, to an archdeacon to swear in a churchwarden who has been elected by the parishioners according to custom (*c*). So, to swear a man into a corporate office to which he has been elected (*d*). So, to the lord or steward of a manor to hold a court leet to swear in a person elected mayor of a borough, according to the direction of the statute 11 G. 1, c. 4, s. 3 (*e*).

So, it lies to command a person to nominate one of two persons presented to him when the persons presenting have the right of electing two, between whom he is to choose (*f*).

It lies in favour of the lord of a manor, who claims to hold a court leet, to enforce the attendance of those who ought to attend to make a jury, and who have before refused, or neglected so to do (*g*).

So, it lies to the steward of a manor and the homage to compel them to hold a court, and present certain conveyances to purchasers of burgage tenements, by which they were intitled to be sworn burgessees of the corporation, and to vote for members of parliament.

THE principal objection made to the awarding of a mandamus, in this case, was, that the homage were not *ministerial* but *judicial* officers, and that it appeared they had already exercised their judgment, and determined the

(*a*) 1 Str. 608. (*b*) 1 Str. 696. (*c*) 1 Ventr. 115, Comb. 417.

(*d*) Vid. 2 Bur. 798, 2 Term Rep. 732.

(*e*) Vid. ante, p. 35, Andr. 279.

(*f*) Vid. p. 276.

(*g*) 2 Str. 1207.

conveyances tendered to them to be fraudulent, and therefore refused to present them at the last court. Lord Chief Justice Lee observed, that this was an ancient borough, consisting of bailiff and burgeses; that the persons making the application, had, as tenants of the manor, a right by purchase or descent to become burgeses, and to vote for members of parliament, and for the bailiff, who was the presiding officer at elections; and that a purchaser could not exercise this right of voting before his purchase deed was presented by the homage at a court, to be holden for that purpose, before the lord of the manor, or his steward: he thought the homagers were, in this case, *ministerial*; that this was a particular authority, lodged in certain persons by the custom of the manor, respecting the *public concern* of the nation, and therefore a mandamus must go to the homage to present the conveyances, and to the steward to hold a court to admit the purchasers, and swear them in burgeses of the town (a).

A MANDAMUS was prayed to the master and wardens of the company of gunmakers, to cause them to give a proof mark to J. S. a freeman of the company; without which he could not sell his guns, because neither the Queen nor any other person would buy any guns, which had not that mark. Holt said, "We cannot do it; they are no legal establishment (b); you must petition the Queen to issue a *quo warranto* against them to repeal their charter for this misdemeanor, but we cannot help you" (c).

(a) Rex v. borough of Midhurst, 1 Will. 283. 1 Bl. Rep. 60, 62.

(b) Qu. what he means by their being no legal establishment? his subsequent words shew, that they were a corporate company.

(c) 2 Ld. Raym. 989.

It is apprehended that at present a mandamus would be granted for such a purpose without hesitation.—The gun-maker is intitled to have the mark put on his guns, if they be of the proper quality; the company, in such a case, are bound by the nature of their trust to grant it;—and there does not appear to be any other adequate specific remedy to the person injured by their refusal.

By st. 1 W. and M. c. 18, s. 2, commonly called the Toleration Act, the justices of the peace, at their general sessions, are required to administer the oaths, and tender the declaration therein mentioned to such persons as shall be willing to take and subscribe them respectively.

By s. 19 of the same statute, no congregation or assembly for religious worship shall be permitted till the place of meeting be certified to the bishop of the diocese, or to the archdeacon of the archdeaconry, or to the justices of the peace at the general or quarter sessions for the county, city, or place in which such meeting shall be held, and registered in the bishop or archdeacon's court respectively, or recorded at the general or quarter sessions: and the register or clerk of the peace respectively is required to register the certificate, and give a certificate of that register.

ON the first of these clauses, a mandamus has been awarded to the justices of the peace to administer the oaths and tender the declaration for subscription (*a*); and on the second to the register of a bishop's court (*b*), and to the justices and clerk of the peace (*c*) respectively, commanding them to register the certificate of a dissenting meeting-house.

(*a*) 6 Mod. 310.

(*b*) 1 Ld. Raym. 125.

(*c*) 4 Bur. 1991.

A MANDAMUS lies to compel a late officer to deliver up the insignia, books, &c. belonging to the office, to his successor.—As, to the *late* mayor of a corporation, commanding him to deliver the insignia to the *new* mayor (*a*) ; to an *old* overseer of the poor, to deliver the books of the poors' rate to the *new* overseer (*b*) ; to a former town clerk, to deliver to his successor the common seal, books, papers, and records of the corporation, which belong to his custody (*c*) ; so, to the clerk of a company who has been removed from his office (*d*) ; so, to any person who happens to have the books of a corporation in his possession and refuses to deliver them to the corporation : thus it was awarded to the executor of a person who had laid out several sums on account of a borough, the executor refusing to deliver them till the money should be repaid (*e*) ; so, it lies, to compel the person who has the custody of public books to produce them at the next corporate meeting (*f*).

A MANDAMUS lies to the spiritual court, commanding them to grant the probate of a will to the executor (*g*).

So, it lies, to grant administration of the goods of an intestate, when there is no doubt of the intestacy (*h*) ; but if that be disputed, it will not be granted on the suggestion that there was no will, or that if there was a will, it was improperly obtained ; because the ecclesiastical court is the proper judge of the validity of the will, and whatever they determine is conclusive at law (*i*). So, where a suit is depending in the spiritual court concerning the validity of a

(*a*) 1 Str. 537. (*b*) 1 Will. 305. (*c*) 2 Bur. 1013.

(*d*) 2 Str. 879. (*e*) Rex v. Ingram, 1 Bl. Rep. 50.

(*f*) 2 Str. 948. 1 Barnard, 235.

(*g*) Raym. 235. 2 Rol. Rep. 107. 1 Ventr. 335. Carth. 457.

(*h*) 1 Ld. Raym. 262. (*i*) 1 Ld. Raym. 262. Comb. 454.

will, that is a sufficient answer to a mandamus commanding them to grant probate to the executor (*a*). But the pendency of a writ of appraisement is not a sufficient answer, if the will be not contested (*b*).

If the ecclesiastical court granted administration to a person who is *not* the next of kin, he who *is* the next of kin is intitled to a mandamus as a matter of course, when there is no other person in equal degree to the intestate, and no widow (*c*); and, in such a case, a suit depending is no answer to the writ (*d*). But when there is a widow, and next of kin, a mandamus will not be granted, commanding the spiritual court to grant administration to the one or to the other; nor, when there are *several* next of kin, to grant it to one of them in particular; but in both these cases the writ must be general to grant administration (*e*). So, it does not lie to grant administration *durante minori ætate* to any *particular* person, because an administrator *durante minori ætate* is only a trustee for the infant, having no interest himself: the writ therefore must be to grant such administration generally (*f*).

WHERE a person has an inchoate right to the exercise of a franchise, a mandamus lies to compel his admission; thus, where a person has a title to the freedom of a corporation by birth or apprenticeship, a mandamus lies to compel the proper person to admit him (*g*); and if by the constitution of the corporation such admission is to be at a

(*a*) 1 Ld. Raym. 262. Comb. 454. Str. 892. 1 Bl. Rep. 640.

(*b*) 1 Bl. 640.

(*c*) 4 Bur. 2295. 1 Bl. Rep. 668.

(*d*) 2 Str. 857. 2 Barnard, K. B. 334.

(*e*) Str. 552. 1 Bl. Rep. 640.

(*f*) 2 Str. 892. 1 Barnard, K. B. 370, 425.

(*g*) Raym. 92, 93. 1 Lw. 91. 2 Sh. 154. Andr. 1. 1 Sid. 107. 1 Keb. 458, 659.

corporate meeting, a mandamus will lie to compel a meeting for the purpose (a).

WHERE a bye law of a city, as of the city of London, orders, under a penalty, that all who practise a particular trade, shall take up their freedom in the company of that trade, a mandamus lies to compel that company to admit to the freedom of it, a man intitled to the freedom of the city at large, by having served an apprenticeship to one of another company (b).

By the statute 26 G. 2, c. 18, any subject of Great Britain desiring admission into the Turkey company, shall, on request made for that purpose by himself or any other person to the governor or deputy governor of the company, be admitted a member on the payment of 20*l.* for the use of the company, and taking the oath prescribed by the statute.

ON this statute a mandamus lies to compel the governor or deputy governor to admit any person desiring it, and tendering the 20*l.* and offering to take the oath (c).

A MANDAMUS lies to compel an officer to execute his office, though there be a penalty for his neglect (d).

WHERE the thing for which a mandamus is requested, will be of no use to the party applying for it, the court will not grant it. Thus, they will not grant it to compel the lord of a manor to admit a copyholder claiming by *descent*, because he has as good a title without admittance as with it, against all the world but the lord (e).

By the act of uniformity (f), no man can preach as a lecturer of any parish church without a licence from the

(a) 1 Bur. 127. (b) Ante, 117—123.

(c) Rex v. March. 2 Bur: 999. (d) B. R. H. 261.

(e) Rex v. Rennet. 2 Term Rep. 198.

(f) 13 and 14 Car. 2, c. 4, s. 19.

bishop, which on a proper occasion the bishop is bound to grant, and the court will compel him if he refuse, as where the rector agrees to grant the use of his pulpit to the person chosen by the parishioners (*a*): but where the rector *refuses* the use of the pulpit, where there is no fixed stipend for the lecturer, but he depends on the voluntary contribution of the inhabitants, and where there is no certain immemorial custom as to the election, the court will not compel the bishop to grant a licence, because it would be nugatory without the use of the pulpit (*b*).

So, where the lecturer is paid out of the poors' rates, and there is no immemorial custom for the lecturer to use the pulpit without the rector's consent, a mandamus will not lie to compel the rector to certify the election of a lecturer to the bishop (*c*).

BUT, where there is an immemorial custom for the inhabitants to elect without consent of the rector, the law supposes there was a good foundation for it, and the court will, in such a case, compel the bishop to grant a licence, whether the rector consent or not; and where there is an endowment, that will be strong evidence in support of the custom (*d*).

WHERE a person is duly nominated to a perpetual curacy, or to an endowed chapel, and the bishop refuses to grant him a licence to preach, a mandamus will lie to compel him (*e*).

IN the years 1752 and 1753, a dispute happened in the cathedral church of Carlisle, about the negative power of

(*a*) Vid. 1 Term Rep. 332.

(*b*) 1 Will. 11. 2 Str. 1192. 1 Term Rep. 331.

(*c*) Rex v. Field. 4 Term Rep. 125.

(*d*) 1 Term Rep. 333.

(*e*) Vid. 2 Bur. 1045, in Rex v. Bloer.

the dean in conferring benefices.—The four prebendaries of which the chapter consists, and of whom one is always vice dean, unanimously elected and nominated, under the chapter seal, Mr. Henry Richardson, to the perpetual curacy of St. Cuthbert's, Carlisle. The dean entered a caveat against his admission, and the bishop refused to admit and licence him; on which application was made to the court of King's Bench for a mandamus to compel him.—The court, after hearing the parties, granted the writ, and the bishop admitted and licensed Mr. Richardson (*a*).

BUT in these cases, the reason why a mandamus lies to the bishop commanding him to grant a licence, is, that there is no other specific remedy.—A *quare impedit* does not lie by the common law for a perpetual curacy, and the nominee cannot bring an action for money had and received against a wrongful possessor, without a licence; for without that he has no legal possession (*b*).—But the nominee of a *donative* may bring an action for money had and received for the profits, because he is in possession without a licence, by the mere nomination (*c*).—So, where a perpetual curacy has been augmented by Queen Anne's bounty, the title becomes determinable by virtue of the st. 1 G. 1, c. 10 (*d*), in the same manner as that to presentative

(*a*) Burn's Eccles. Law, tit. Deans and Chapters, s. 4.

(*b*) Pr. Ld. Mansfield, 1 Term Rep. 401, in the notes.

(*c*) 3 Will. 355.

(*d*) By this statute, s. 4, after reciting that the late Queen Anne's bounty to the poor clergy was intended to extend, not only to parsons and vicars who come in by presentation or collation, institution and induction, but likewise to such ministers as come in by donation, or are only stipendiary preachers or curates, most of which are not corporations, nor have a legal succession, and therefore are incapable of

presentative benefices, or, in other words, by *quare impedit*; and therefore, where there is a cross nomination to such

taking a grant or conveyance of such perpetual augmentation as is intended by the said bounty; and in many places it would be in the power of the donor, impropriator, parson, or vicar, to withdraw the allowance which was before paid to the curate or minister serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate and officiate there himself, and take the benefit of the augmentation, whereby the maintenance of the curate would be sunk instead of being augmented; it is enacted, that all such churches, curacies, or chapels, as shall be augmented by the governors of the said bounty, shall be from thenceforth perpetual cures and benefices, and the ministers duly nominated and licenced thereto, shall be, in law, bodies politic and corporate, and have perpetual succession, and be capable to take in perpetuity; and the impropriators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto such augmented curacy or chapel doth appertain, shall be excluded from receiving any profit by such augmentation, and shall pay to the ministers officiating, such annual and other pensions and salaries as by ancient custom, or otherwise of right and not of bounty, they were before obliged to pay.

And, by s. 6, for continuing the succession in such augmented cures hereby made perpetual cures and benefices, and that the same may be duly and constantly served, it is enacted, that in case such augmented cures be suffered to remain void by the space of six months, without any nomination within that time of a fit person to serve the same, by the person or persons having the right of nomination thereto, to the bishop or other ordinary, within that time, to be licenced for that purpose, the same shall lapse to the bishop, or other ordinary, and from him to the metropolitan, &c. according to the course of law used in cases of presentative livings and benefices, and the right of nomination to such augmented cure may be granted or *recovered*, and the incumbency thereof may and shall cease and be determined in like manner, and by the like methods as the presentation to or incumbency in any vicarage presentative may be now respectively granted, recovered, or determined.

augmented.

augmented curacy, a mandamus will not lie to compel the bishop to grant a licence.

THE chapel of St. Helen's, situated in the hamlet of Hardshaw, in the parish of Prescott, in the county of Lancaster, had been consecrated from time immemorial, and the usual offices of the church had been constantly performed in it, and previous to the death of an incumbent in the year 1785, it had been twice augmented by Queen Anne's bounty.—On the death of this incumbent the right of appointing to the curacy was claimed by two several parties.

On the one hand this right was claimed by the vicar of Prescott, and on the other by certain feoffees, or trustees, who had been from time to time elected by each other, and who alleged that the chapel, the chapel yard, and the grounds belonging to them, had been vested in them for many ages past; a majority of the trustees, on the 26th of December, 1785, nominated William Finch to be curate of the chapel, by a deed under their hands and seals, which was presented on the 6th of May following, to the chancellor of the diocese of Chester, who was appointed in the absence of the bishop to grant licences; but the chancellor, and the bishop, to whom a similar application was afterwards made, severally refused to grant a licence.—The vicar, by a deed under his hand and seal, dated the 31st of March, 1786, appointed John Barnes, who on the 1st of April requested the chancellor of the diocese and the bishop to grant him a licence, who severally declined it.—The trustees and the vicar severally entered caveats in the bishop's court against each other's claims.

THE trustees applied for a mandamus to compel the bishop to licence William Finch, and in support of their

application stated, that a majority of the trustees had constantly appointed a curate to officiate in the chapel, who had always received the profits of it without any institution or induction from the ordinary the trustees having held it as a donative before the augmentation; and that since that time the curate appointed by them had always applied for a licence from the ordinary to preach and officiate in the chapel, and had obtained it.

IN opposition to this application, the chancellor of the diocese swore that the chapel had always been deemed subject to the ecclesiastical jurisdiction of the ordinary or bishop, and suggested that as it had been augmented by Queen Anne's bounty, it was by virtue of the statute of G. 1, to be considered as a perpetual cure or benefice, subject to lapse as a presentative living; that the right of nomination to it had become grantable and recoverable, and the incumbency liable to be determined by the like methods as that of any vicarage presentative; and that the chapel having become litigious in consequence of the abovementioned claims, the bishop had therefore declined granting a licence.

THE court said, that as there were cross nominations, the bishop was not bound to decide which of the contending parties had the better title; and if he did take upon himself to decide that question, he might equally be bound to grant a licence to both; in which case there would be a contest for the possession of the pulpit: it was therefore proper that he should withhold his licence till the right was determined. That in the case *St. Cuthbert's, Carlisle*, which had been mentioned as a case in point, there had been no cross nomination, the dean only claiming a negative; and it had not appeared to the court that the curacy had been augmented: there was a distinction, there-
there-

fore, between that case and the present.—It was not contended here, that either party had not another remedy to enforce his right ; each had a specific remedy by “*quare impedit* ;” and as the foundation of the application was that the curacy was a donative, each might try his title against the other who should take the rents and profits, by an action for money had and received. The licence, therefore, would not forward the right of him to whom it was given.

ON these principles the mandamus was refused ; and as this was the second application of this kind, the court desired it to be understood, that if a similar one were made afterwards on the same ground, they would discharge the rule with costs (*a*).

WHERE the right of nomination is in one person, and that of presentation in another, and either impedes the other in his right, a “*quare impedit*” lies, and therefore a mandamus will not be granted in favour of the person nominating, to compel the other to present the nominee to the bishop (*b*).

AND it is a general rule, that wherever there is another *adequate* specific remedy, a mandamus will not be granted. Thus where an action of debt was brought in an inferior court, in which the plaintiff was nonsuited, and the defendant had judgment which the court refused to execute ; the defendant applied to the court of King’s Bench for a mandamus to compel them ; but it was refused, because the defendant had a specific remedy by the writ *de executione judicii* out of Chancery (*c*).

(*a*) *Rex v. bishop of Chester.* 1 Term Rep. 396.

(*b*) *Rex v. Marquis of Stafford,* 3 Term Rep. 646.

(*c*) 3 Salk. 229.

So, a mandamus does not lie to command the officer of an inferior court to do his duty, because the judge of the court may deprive him of his office if he refuse (*a*).

So, where a visitor has executed a sentence given in a matter beyond his jurisdiction, a mandamus does not lie to command him to reverse it; the proper remedy is an action for damages by the party injured (*b*).

So, where there is a visitor, a mandamus does not lie to compel the doing of any thing which falls within his jurisdiction (*c*).

So, it does not lie to churchwardens to compel them to make a church rate; that being a subject purely of ecclesiastical jurisdiction (*d*).

So, it does not lie to compel admission to the degree of barrister: the inns of court are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning: but all the power they have concerning admission to the bar is delegated to them from the judges, and in every instance their conduct is subject to their controul as visitors. The proper remedy, therefore, for the person aggrieved by their refusal, is an appeal to the twelve judges (*d*).

A MANDAMUS will not be granted to compel the Bank to transfer stock, because an action of assumpsit will lie for complete satisfaction equivalent to a specific relief (*e*).

(*a*) Vid. ante, p. 283.

(*b*) Vid. ante, p. 281.

(*c*) 1 Sh. 74. 2 Sh. 170. 1 Keb. 2, 36, 61, 101, 234, 289, 833. Raym. 31. 1 Lev. 23, 65. 1 Sid. 71. 3 Salk. 233.

(*d*) Rex v. churchwardens of St. Peter's, Thetford, 5 Term Rep. 364.

(*d*) Doug. 354, (340).

(*e*) Rex v. Bank of England, on the prosecution of Parbury, &c. Doug. 526, (508).

WHEREVER a *quare impedit* lies, a mandamus does not lie, because the former is a complete specific relief.—It is true there is a case reported in *Strange* (a) and *Andrews* (b) of a mandamus directed to the bishop of Sarum, commanding him to admit one Clarke to a canonry or prebend in the cathedral church there, and to institute, induct, and invest him therein: and though it was strongly opposed on the rule to shew cause, as turning the common law remedy by *quare impedit* into another channel, yet the court ordered the writ, on the ground that this was a more expeditious and less expensive remedy than the other. But as the parties agreed to refer the dispute, the writ never issued.

THIS case, however, is not to be considered as an authority, for when it was cited on a subsequent occasion, Lord Mansfield remarked, that Mr. J. Dennison had always thought that case wrong; and added as a reason, that no case was proper for a mandamus, but where there is no other specific remedy (c).

PREVIOUS to this case of Clarke, a mandamus had issued, commanding the dean and chapter of Norwich to admit Dr. Sherlock to a prebend of the cathedral church there. The writ suggested, that Queen Anne, by letters patent, in the thirteenth year of her reign, had incorporated Dr. Sherlock, then master of Catharine Hall, in Cambridge, and the fellows and scholars for ever, and granted that the then master should succeed to the next vacancy of a prebend in Norwich, and his successors, masters of Catherine Hall after him; that these letters patent were confirmed by act of parliament (d), and that one of the prebendaries was now dead: they returned, that King Edward the sixth, by

(a) Str. 1082.

(b) Andr. 20.

(c) 1 Term Rep. 401.

(d) 12 Ann. st. 2, c. 6.

letters patent, in the first year of his reign, erected the deanery and chapter of Norwich into a corporation, endowed the church, and gave them perpetual succession; that neither he, nor Queen Mary, nor Queen Elizabeth, made any statutes for the government of the corporation: but that King James, by a body of statutes, ordained, that as often as there should be any vacancy, the dean and chapter should *admit* such person as the King should nominate under the great seal: but that none should be admitted to be dean or prebendary, who before was prebendary of any other cathedral church: that these were the statutes which they had sworn to observe: and because Dr. Sherlock was dean of Chichester and a prebendary of St. Paul's, they could not admit him.

THE only question here was on the effect of the local statutes in opposition to the letters patent, and their confirmation by the act of parliament. The chief justice (a) delivered the opinion of the court in favour of a peremptory mandamus to this effect:—That on the first letters patent of James the first, the power of the King, as founder, was restrained, and the dean and chapter, as the matter stood upon those statutes, might well refuse such a person as Dr. Sherlock, as they might also have done on the letters patent of Queen Anne, for that she having but a bare right of nomination, could never unite the canonry itself to the mastership of Catharine Hall. Those letters patent might, perhaps, have their effect as a perpetual nomination; but there was no occasion to determine that point now, since there was an act of parliament which had confirmed them, and by which the canonry itself was united to the mastership of Catharine Hall, and it not being de-

(a) Pratt.

nied

nied that Dr. Sherlock was master, he was in that character intitled to a peremptory mandamus (*a*).

HERE no objection was taken to the mandamus as not being proper, on the principle, that there was another specific remedy by "quare impedit:" and, indeed, as the act the dean and chapter were commanded to do, was merely such a ministerial act as they must have done, had Dr. Sherlock *recovered* in a quare impedit, there does not seem to have been any room for such an objection.

By st. 17 G. 2, c. 5, intituled, "an act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons," it is enacted (*b*), that "in case any petty constable, or other such officer of any parish or place, shall bring to any high or chief constable, such certificate, as is described in a former part of the act, granted by any justice or justices of the peace for the proper county or place, ascertaining how and for what rates and allowances he shall be required to convey any rogues, vagabonds, or incorrigible rogues, together with a receipt or note from any constable or other officer or person to whom the person or persons so to be conveyed was or were delivered, the high or chief constable shall and may pay to such petty constable or other officer, the rates or allowances ascertained in and by such certificate, and no more, taking from such petty constable or other officer such certificate, and his receipt for the same; and the said high or chief constable shall be allowed the same by the treasurer of the county, riding, liberty, division, corporation, or franchise, on passing his accounts, on his producing and delivering up such certificate and receipt, and giving his own receipt for the same to such treasurer, and the justices at the general or quarter sessions

(*a*) Vid. a similar case. 1 Barnard, K. B. 40.

(*b*) S. 17.
shall

shall allow the same to such treasurer in his accounts, on his producing and delivering up the vouchers aforesaid”.

AN application having been made on this statute, on behalf of two petty constables of Shaftesbury, where there was no chief constable, for a mandamus to the treasurer of the county, commanding him to reimburse the petty constables the several sums of money expended by them in maintaining and conveying several rogues, vagabonds, and other idle and disorderly persons according to the act: Lord Mansfield said, “there is waste enough on these occasions already: they are obliged to apply to the quarter sessions, and the surplus only is to be paid over, which shews that the sessions have a jurisdiction to make deductions” (a).

THE court will not grant a mandamus to compel the performance of any thing in future, which had been voluntarily done before: therefore, where trustees under a road act had turned a road through an inclosure, and made the fences at their own expence, and repaired them for several years, a mandamus was refused to compel them to continue such repairs, because there was no special provision in the act to that effect (b).

WITH respect to offices or places, a mandamus may have for its object, to compel the election or appointment of a person to fill the vacant place or office, to compel the admission of the person chosen or appointed, or to compel the restoration of a person unjustly removed.—With respect to franchises, to compel the admission of the party possessing an inchoate title to a franchise, or the restoration of one unjustly disfranchised.

(a) *Rex. v. Walter Erle, gent.* 2 Bur. 1197.

(b) *Rex v. commissioners of Llandilo district.* 2 Term Rep. 232.

A **MANDAMUS** lies commanding the proper persons to elect such officers in corporations as have a relation to the government of them, or to the administration of public justice, and this, in many cases, by the common law previous to the statute of 11 G. 1 (*a*). But as the power of the court of King's Bench extends only to enforce obedience to the King's charter, there were many cases in which, before that statute, they could not interpose; as where by the charter a particular day was fixed for the election of a mayor or other chief officer, and no election was had on such a day; for, in such a case, to have commanded the corporation to proceed to an election at *another* day, would not have been to enforce obedience to the King's charter, but to authorise them to act in opposition to it (*b*): in what cases it lies in consequence of that statute has been shewn on a former occasion (*c*).

So, it lies commanding those who by any statute have the nomination or appointment to a place or office in which the public interest is concerned, to fill it up when vacant.

By the land tax act (*d*) the receiver general, on the receipt of the whole assessments of the county, &c. is to allow and pay, according to such warrant as shall be given in that behalf by the commissioners, or any two or more of them, three half-pence in the pound and no more to the commissioners clerks, for their pains in fair writing the assessments, duplicates and copies mentioned in the act, and all warrants, orders, and instructions relating thereto; and these clerks are to be appointed by a majority of the *acting*

(*a*) Vid. 5 Mod. 275. 1 Ld. Raym. 481.

(*c*) Vid. ante, p. 36—43.

(*d*) 25 G. 3, c. 4.

(*b*) Bul. Ni. Pr. 201.

commissioners

commissioners present at each respective meeting within every hundred, lathe, wapentake, rape, ward, or other division.

THE commissioners of the land tax are, as such, commissioners for the window and house tax.

A DISPUTE having arisen with respect to the validity of an election of a clerk to the commissioners acting for the parish of St. Martin in the fields, in Westminster, on account of the respective claims of two candidates, an action was tried to determine which of the two was duly elected, when the election of both was set aside. After this decision the commissioners, at a meeting which was convened for the purpose of putting the land tax act into execution, proceeded to the election of a clerk in the department for the rates and duties on houses, windows, and lights; when one of the former candidates was elected without notice to the friends of the other, that the election was to be made on that day, or even that the commissioners were to meet for any other purpose, than that of carrying the land tax act into effect.

ON this the disappointed candidate applied for a mandamus to be directed to the commissioners, commanding them to proceed to the election of a clerk in the department for the rates and duties on windows, houses, and lights.

THE application was resisted on the ground, that the office was not of sufficient permanency to induce the court to interpose; that the appointment was only for each particular meeting of the commissioners, who might appoint some other person at their next meeting; and that where the commissioners chose to continue the same person in the appointment, it was only a matter of convenience to them; so that it was nugatory to comply with the present motion, because if the mandamus issued, and the commissioners

missioners obeyed it, the clerk appointed under it, might lose his office after the first meeting.

LORD MANSFIELD observed, this writ of mandamus was a very beneficial writ; that it was grantable, where there was no other specific legal remedy; that it was of peculiar use in those cases, where, if there were not this remedy, the contest must be productive of endless mischief and inconvenience to the litigating parties; that if clerks were appointed under this act each time of meeting, there would be no end to the elections; but that they received their allowance under an *annual warrant*, so that their appointment was at least for a year—for these reasons the writ was granted (*a*).

So, a mandamus will lie to compel a dean and chapter to fill up a vacancy among the prebendaries or canons residentiary, when by the constitution of the church they have the election (*b*).

BUT, where an office does not concern the public interest, but has been instituted merely for the purpose of shew or ceremonious attendance on a particular magistrate, as a mace-bearer, to attend the mayor, it seems the court will not compel an appointment, by mandamus (*c*).

To entitle a party to a mandamus to be *admitted* or *restored* to a place or office, it has been frequently held, that the latter must have some relation to the public; and on the ground of its being merely a place of private service, the writ has frequently been refused. Thus where an application was made for a mandamus to the company of gunmakers in London, commanding them to restore one Vaughan to

(*a*) *Rex v. commissioners of the land tax for S. Martin's, Westminster*, 1 Term Rep. 146. (*b*) *Vid. ante*, p. 268, 270.

(*c*) *Rex v. borough of Liverpool*, 1 Barnard, K. B. 82.

his place of approver of guns, of which he had been deprived; the court said, "this was a thing in which the *public* were no way concerned, nor was there any public law for it; it was therefore out of the reason of a mandamus;" but, they added, "your way will be to petition the Queen, and she, perhaps, will order the attorney general to bring a quo warranto against them" (a). But now the value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a *right*, and no other *specific* remedy, a mandamus will not be denied (b).

A MANDAMUS was formerly refused where an assize would lie, on the principle of that being another specific remedy (c). An assize lay for tenant for *life* of an office of *profit*; as of the office of sheriff, where it was granted for life; of a steward, bailiff, receiver, or beadle of a manor; of a prothonotary, philaster, or other officer for life in Chancery, King's Bench, or Common Pleas; of offices in the Admiralty, or spiritual or other court; as well as in the courts of common law; as of the register of the Admiralty, or of a bishop.—It lay only by tenant in fee, in tail or for life, against the tenant of a freehold, or against the tenant and the disseisor: but it did not lie by a person who had a less interest than for life, nor of an office which had no profit annexed to it, but was merely an office of charge (d). It has been said too, that it was only where the officer was appointed by patent or grant, and not where his title was by election, that an assize lay to restore him

(a) Vaughan v. company of gun-makers in London. 6 Mod. 82.

(b) Per Ld. Mansfield. 3 Bur. 126, 7.

(c) Vid. 6 Mod. 18. 3 Salk. 232.

(d) Vid. Jehu Webb's case, 8 Co. 47. 2 Inst. 312, F. N. B. 177, A. Com. Dig. Assize, B. 2, 3, 4, 5, 6, B. R. H. 100.

if unjustly disseised (*a*), and it lay only to *recover* an office, and not to be admitted to it: so that the objection of an assize could never be made to the application for a mandamus to admit.

ON the distinction between a patent and other officer, perhaps it may be possible to account for some seeming contradictions in the books. A mandamus has been refused to restore a person to the office of water-bailiff of the river Severn, because, being a patent officer, an assize lay for it; but it has been granted to restore to the office of surveyor of the New River water; probably because the appointment was by election (*b*).

ON the ground of being a *private* office, as well as that an assize lay for it, if it was a freehold, a mandamus was refused in the time of Holt, to restore a man to the office of clerk to the butchers company of London (*c*); but afterwards, on hearing counsel on both sides, a mandamus was granted, and the court said, it was the same case with that of a town clerk (*d*), for which a mandamus had often been granted.

BECAUSE an assize did not lie for a place or office which was not a freehold, or to which no profit was attached, a mandamus, even when the objection of an assize had its effect, was frequently granted to restore a man to the place of alderman of a town, to the place of common councilman of the city of London, and to the freedom of a town of which he had been unjustly deprived (*e*). The first is a freehold indeed, but no profit is attached to it; the second is neither a freehold, nor is any profit attached to it; and the third is a mere privilege.

(*a*) Comb. 244. 1 Term Rep. 404. (b) Comb. 347, 348.

(c) 6 Mod. 18. 3 Salk. 232. (d) 2 Ld. Raym. 959, 1004.

(e) Palm. 451, 454. Style 32, 33, 35, 42, 43. Vid. chap. 3, §. 9, pr. totum.

THE remedy by affize is now become obsolete, and therefore the question whether an affize will lie never makes any part of the consideration, whether a mandamus ought to be granted or not.

THE nature of the interest, which the possessor of a place or office has in it, seems now the *principal* question to be considered on an application for a mandamus, either for admission or restoration.

IT has been refused, to restore a surgeon to an hospital, on the ground, probably, of his having no permanent interest in the place (*a*): but it has been granted to restore a town clerk, the common clerk of a vill, a parish clerk, a sexton, a scavenger (*b*),—To restore a schoolmaster of a grammar school of royal foundation (*c*).

IT has been granted to restore to the office of register of a bishop's court (*d*), and of an archdeacon (*e*); and though Holt said this had been against his will, because an affize lay for such offices (*f*), yet it is now established, that a mandamus will lie either to admit or to restore to such offices (*g*).

IT has been said, that a mandamus lies to restore a man to the office of steward of a court leet, but not to that of a court baron (*h*). And Twisden gave as a reason for this distinction, that in the court leet the steward is judge, but that in a court baron the suitors are judges; but Hale said he was of another opinion, for that the steward is judge of that part of the court which concerns the copyhold, and register of the other (*i*); and in other places a distinction

(*a*) Vid. Comb. 41. (*b*) 1 Ventr. 143, 153, Comb. 419.
 Styl. 458. 1 Str. 59, 115. 3 Bur. 1267. 2 Term Rep. 181.
 (*c*) 1 Str. 58. (*d*) Comb. 264. (*e*) Carth. 170.
 (*f*) 6 Mod. 18. 3 Saik. 232. (*g*) Str. 897.
 (*h*) Raym. 12, Sid. 40, Comb. 127. (*i*) 1 Ventr. 153.

is made between the case of a steward of a court baron who has a patent for life, and one who has not, a mandamus lying in the one case and not in the other (*a*).

It has been often doubted, whether a mandamus lies to restore an attorney of an inferior court; but at last determined that it does, because he cannot have an assize, and though he might have damages for the unjust removal, yet that cannot be a sufficient recompence for depriving him of his livelihood (*b*). Yet it has been refused to restore a proctor of the spiritual court, on the ground that the office is private, and that the spiritual courts have a power over their own officers (*c*). The propriety of this distinction between the cases of the attorney and the proctor, may, however, well be doubted; as the attorney is no more a public officer than the proctor, and he is equally under the correction of his own court.

A MANDAMUS has been awarded to the dean and chapter of Westminster, commanding them to admit a man to the office of high bailiff (*d*). So, it lies to the justices of the peace to restore a man to the office of *clerk* of the peace (*e*).

A MANDAMUS was granted to the court of aldermen in London, commanding them to restore two persons to the office of yeomen of the wood wharf, on an affidavit, that it was an ancient office and a freehold (*f*).

ON an application for a mandamus to be directed to the mayor and aldermen of the city of London, commanding them to restore one Smith to the office of clerk or surveyor

(*a*) 1 Sid. 40, 169. 2 Lev. 18. Fitzg. 194.

(*b*) Vid. 1 Sid. 94, 152. 1 Lev. 75. 1 Keb. 349, 549, Raym. 56, 57.

(*c*) Skin. 299, Sh. 217, 220, 251, 261. 3 Lev. 309. 3 Mod. 332. 1 Ventr. 331.

(*d*) Comb. 244.

(*e*) Comb. 317. 2 Ld. Raym. 1268.

(*f*) 2 Str. 832.

of the city works, it was stated, that this was an ancient and public office, with fees and profits belonging to it, that Smith had purchased it for 600*l.* and had been appointed *quamdiu se bene gesserit*, that he was sworn into the office by a particular oath appointed for that purpose, and had also taken the oaths to government. The application was opposed, on the ground, that the office was of a private nature, from which the party might be removed for misbehaviour; that an application had been made for a mandamus, in the year 1658, to restore to this very office; and the court had refused the writ, because this did not appear to be a *public* office (*a*); that this was not like the case of the yeoman of the wood wharf, as that was an appointment under several acts of parliament; and that in the present case a mandamus ought not to be granted, because the party might have an assize or an action on the case.

THE court were of opinion, that though from some of the circumstances this appeared to be like a private office, yet as the affidavits which stated it to be a public one, were not denied, a mandamus ought to be granted, that they might be the better able to judge on the return. They observed, likewise, that since Holt's time, this writ had been granted for offices of much less consequence than the present (*b*).

ON an application for a mandamus to be directed to the mayor, aldermen, and common council of London, commanding them to restore one Roberts to the office of clerk or comptroller of the Bridge House estates; it appeared, from affidavits, that this was an ancient office held *quamdiu se bene gesserit*, in the disposal of the common council; that the duty of it was to superintend and take care of certain

(*a*) 2 Sid. 112..

(*b*) 2 Barnard, K. B. 398. 2 Term Rep. 182 n.

estates, which were appropriated by the corporation to the support and repair of London-bridge, and of which some had been granted to them expressly for that purpose; and that Roberts had been admitted and sworn into this office, in 1749, on paying 4000*l.* to his predecessor, and 600*l.* for an alienation fine.

THE court at first doubted, whether this office was of such a nature, that a mandamus would lie for it, under an idea, that it had been refused in the scavenger's case; but on further consideration, and being apprized, that it had been granted in that case, they were of opinion, that it would lie in the present (*a*).

A MANDAMUS does not lie to restore a deputy, in the name of the deputy himself, because he is generally removable at will (*b*), that is, removable at the will of his principal; yet it lies at the suit of the principal, to those who have removed the deputy, for otherwise he might, by the act of third parties, be deprived of his right to *make* a deputy; and when, to such a writ, it was returned, that at the time of the writ delivered, the person of whose removal the complaint was made, was not a deputy appointed; this was held insufficient, and a peremptory writ was awarded, on the ground, that his not being a deputy appointed, might be owing to the expulsion of him from his place by those, to whom the writ was directed (*c*). And the authority of this case was afterwards fully recognized in that of the King against Dr. Ward, of which the circumstances were these.

A MANDAMUS was directed to the defendant, commanding him to admit Henry Dryden to be deputy register of the court of the archbishop of York. It suggested,

(*a*) *Rex v. mayor, &c. of London*, 2 Term Rep. 177.

(*b*) 2 Keb. 742, 3. 1 Sh. 253. (*c*) 1 Lev. 307. 1 Vent. 110.

that Dr. Thomas Sharpe had been admitted to the office, to execute it by himself or his deputy; that he had appointed Dryden, who was averred to be a fit person, to be his deputy; and that the defendant, as commissary, had refused to admit him.

To this the defendant made a return, which was held insufficient; and then, among other exceptions, taken to the writ, it was contended, that it would not lie for a deputy; to which it was answered, that this was not a mandamus for the deputy himself, but for the principal to be admitted to have a deputy; that the refusal was suggested to be to the damage of Dr. Sharpe, who appeared to have a freehold in the office, though his deputy was but at will; and the case immediately preceding was relied on as an authority in point. The court held, that the writ lay in this case, and therefore awarded a peremptory one (*a*).

It has been doubted, whether if an officer be only *suspended* from his office, he can have a mandamus to be restored. In the case of the King against the approved men of Guildford, the court refused to grant a mandamus to restore Mills, one of the approved men who had been suspended, saying, that if injured he might have an action on the case, but that as he had not been totally removed, a mandamus would not lie, because the freehold still remained in him. Twisden was, however, of a different opinion, and in the following year a mandamus was granted on the application of the same person to restore him to the same office; but it does not appear, from the reports, whether he had not been absolutely removed in the intermediate time (*b*).

(*a*) Rex v. Ward, 2 Str. 893. 1 Barnard, K. B. 252, 294, 380, 411.

(*b*) 1 Keb. 868, 880. 2 Keb. 1. 1 Lev. 162, Raym. 152. 2 Term Rep. 179.

A MANDAMUS gives no right, not even a right of *possession*, but puts a man in possession to enable him to *assert* his right, which, in some cases he could not do without it; and his possession may afterwards be disputed by every man who has a right. (a). But a distinction has been made between a *legal* and an *actual* possession, and it has been said, that where the party applying has the former, the writ can give him no more, and he must obtain the latter as he can.

ROBERT DOWGATE had been legally instituted and *inducted* to a prebend or canonry in the cathedral church of Dublin; but, because he refused to take an oath, which he was required to do in consequence of a bye law, the dean and chapter refused to *admit* him to his stall in the choir and voice in the chapter; on which he obtained a mandamus from the court of King's Bench in Ireland, commanding them to admit him; they made a return which was adjudged insufficient, on which a peremptory mandamus was awarded: the dean and chapter brought a writ of error in the King's Bench in England; on which one question was, whether in this case a mandamus lay: on this point the chief justice (b) expressed himself to this purpose—"a mandamus to admit a person to an office is only to give him a *legal* possession; and if he has that already, the court will go no further, but leave him to obtain *actual* possession as he can: this is the reason why the court grants a mandamus to be sworn into an office, for the party till he is sworn in has no *legal* possession, and consequently is without remedy: and the reason why, in the case of a mandamus to admit, they do not meddle with the *actual* possession, is, that when they have given him a *legal* one, he is by

(a) 8 Mod. 334. 1 Str. 541, 543. Rex v. Dr. Harris, 3 Bur. 1421.

(b) Pratt.

law as much intitled to every right belonging to the office, as if he had the *actual* possession, and may maintain that right without the assistance of the court, even against one who is in possession of the office. If when there is already a *legal* possession, the court were to interpose further, the consequences might be mischievous; there may be two persons who both claim a title to the same office, and each have an equal right to the assistance of the court; a mandamus is granted to each of them to be admitted; the writs are executed on behalf of both; what are they to do when they come together? they must have recourse to open violence, and thus the court become the means of breaking the peace, which it is their duty to preserve.— In the present case the party has been inducted, which gives him a legal possession, and that is sufficient: this is not like the case of Dr. Sherlock, for that was founded on an act of parliament, which said, “he should have a stall and voice, and till that was assigned he was not in *legal* possession of the prebend.”

EYRE, Justice, said, he thought the mandamus proper; “it was to admit a man to the exercise of his office; and if a common councilman, after being sworn in, should be refused admission into the council room, he might have a writ for that purpose; he took Dr. Sherlock’s case to be the same with this, for he was prebendary by virtue of the act of parliament, without any further ceremony, and had the same right to his seat and voice as this man had; and if a mandamus would not lie, he did not see what other remedy he had to get into his stall, unless it were by force.”

ON a second argument, it was again insisted, that the party was in *legal* possession of the office, and that therefore he had all that the writ could give him: to which it was

was answered, that it appeared Dowgate had a right to a stall, and in consequence of that, he must have a remedy to obtain it: it was not pretended that a *quare impedit* would lie, nor could he bring an assize, as he had the office already, and that for which he was contending was only a privilege annexed to it; he could not have an ejectment, as it was not a thing of which the sheriff could give possession, nor would an action on the case answer his purpose, because in that he could not recover his stall, but only damages for being kept out of possession: it seemed strange, that he should be considered as being already in possession of every thing the writ could give him, when it appeared, by the writ and return, that though he was archdeacon, yet he had no kind of possession of this particular franchise (a).

THE case was afterwards determined on another point, and therefore no direct conclusion can be drawn, as to this question; but the reason of the thing seems to be in favour of the mandamus; and in fact the case itself is several times cited in such a manner as to shew, that those who cite it, consider it in that light (b).

WHERE a person, by virtue of a nomination, the *right* to which is disputed, has been once in possession of an office, and afterwards dispossessed by violence, the court will grant a mandamus to restore him.

THE chapel of Calton, in the parish of Matfield, in Staffordshire, is a donative endowed with lands; the inhabitants of four different parishes contribute to the repair of it; and the curate has a stipend: on a nomination by the vicar, who swore he *believed* he had the right of nomination, Mr. Langley had been eleven weeks in possession,

(a) Rex v. dean and chapter of Dublin, 1 Str. 536.

(b) Vid. 2 Str. 895. Andr. 20.

when one Samuel Blooer, a parishioner of Matfield, and an inhabitant of the chapelry, turned him out of the chapel and locked it up.—An application for a mandamus to restore Mr. Langley was opposed on affidavits, in which the deponents swore *they* believed that the right of nomination was in the inhabitants.

THE court proposed to the parties to try the merits in a feigned issue; but this was declined on the part of Blooer, who insisted on taking the opinion of the court, “whether the rule ought not to be discharged.”

LORD MANSFIELD then said, “this is a mere *temporal* question. Three objections have been offered against making the rule absolute. First, That there is no sufficient *ground* for asking a mandamus; to which the answer is, that this chaplain has shewn an appointment and a licence, and that he was in quiet possession for eleven weeks. Secondly, That he has *not* the right; for that the nomination was not in the vicar, but in the inhabitants; to which the answer is, that we cannot try the merits upon affidavits; he *claims* a right though it be litigated, and that is sufficient for the present purpose. Thirdly, That even supposing him to have a title, and to have been in possession, and turned out of it; yet he ought not to be assisted by way of mandamus, but be left to his ordinary legal remedy by ejectment, or an action of trespass.—To this the answer is, that a *mandamus to restore* is the true specific remedy, where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases in which the established course of law has not provided a *specific* remedy by another form of proceeding; which is the case with rectories and vicarages.—Here are lands annexed to this chapel, which belong to the chaplain in respect of his function. If the bishop had refused with-

out cause, to license him, he might have had a mandamus to compel him (*a*). He is now turned out of the chapel and every thing belonging to it by force. Such chapels were not objects of attention in the days when the register was formed, and, therefore, there is no particular remedy provided for this case.

“It is said, he may bring an ejectment or an action of trespass. I am not sure that he can, it does not appear that the legal property is in him; on the contrary it is certain that it is *not*. It might originally be in feoffees: those feoffees may not have been regularly continued: it may be impossible to find the heir of the survivor: if they have been continued, the present feoffees may refuse to let Mr. Langley make use of their names: nor would either of these actions, if he could bring them, be a specific remedy: in the one he might recover damages; in the other he might recover the land; but by neither would he be restored to his pulpit, and quieted in the exercise of his function. We may very well take notice too, that the inhabitants refuse to try the merits in an issue. We shall see what return they will make to a mandamus. This is the course which ought to be adopted in the present case” (*b*).

WHERE there is a disputed election, the court will grant a mandamus to *admit* the person who seems to have the best right, even though the opposite party be actually in possession; provided there be no other specific remedy.

ONE Charles Vinson made a deed of release to John Enty, a dissenting minister at Plymouth, and other trustees,

(*a*) This must be on the supposition that a licence was *necessary*; but this chapel being stated to be a donative, no licence was necessary.

(*b*) *Rex v. Bloer*, 2 Bur. 1043, cited 1 Bl. Rep. 300.

settling a meeting house then newly built, a garden, &c. on the said trustees, in trust, among other things, "to suffer the meeting house to be for the public worship of God by such congregation of protestant dissenters, commonly called presbyterians, as should sit under and attend the ministry of the said Mr. John Enty, or such other presbyterian minister or ministers as should in his and their room successively, in all times then coming, be *by the members in fellowship* of the said or such like congregation or congregations, regularly and fairly *chosen and appointed* to be the minister, preacher, or pastor, to preach in the said meeting."

THE place of minister of this meeting being vacant, Mr. Mends and Mr. Hanmer were candidates; the former was supported by the majority of the congregation, and the latter by the trustees, who put their candidate into possession: on the behalf of Mr. Mends, therefore, an application was made for a rule calling on the trustees to shew cause, "why a mandamus should not issue directed to them, commanding them to admit Mr. Mends to the use of the pulpit as pastor, minister, or preacher of the said congregation, he having been duly elected thereto."

IN support of the application the case of Bloer was mentioned; and Lord Mansfield took that opportunity of declaring, that the court had thought of that case since the determination of it, and were thoroughly satisfied with the principles on which the mandamus had been granted.—The present was not indeed exactly similar to that case; but it was reasonable to grant a rule to shew cause.

ON shewing cause, it appeared there was no colour for the election of Hanmer, and that that of Mends was liable to objections: but the trustees wished to maintain Hanmer with a high hand; and as they thought their strength lay in

in throwing obstacles in the way of *any* redress, more especially a speedy one, their counsel with great earnestness and ability argued against making the rule absolute for a mandamus, and contended that it could not be "to admit," where another was in possession: in support of which they adverted to the distinction made in the case of the dean and chapter of Dublin, between a mandamus to admit and a mandamus to restore, "that the former was only to give a *legal* not an *actual* possession: though in a mandamus to restore, the court would go further."—Here there was another person in possession, which Mr. Mends had never been.—Lord Mansfield, after explaining the principles on which the writ was usually granted, observed that the deed was the foundation and endowment of the pastorate; the form of the instrument was necessarily by way of trust; for the meeting house and the land on which it stood, could not be limited to Enty and his successors. Many lectureships and other offices were endowed by trust deeds. The *right* to the function was the substance, and drew after it every thing else as appurtenant to it. The power of the trustees was merely in the nature of an authority to admit. The use of the meeting house and pulpit in this case followed, by necessary consequence, the right to the function of minister, preacher, or pastor, as much as the *insignia* the office of a mayor, or the custody of the books that of a town clerk.

THE court proposed an issue to try, "whether Mr. Hanmer was or was not duly elected," as the cheapest and best way of determining the dispute.

THE trustees knew that the election of Hanmer could not be supported on a trial; that of Mr. Mends seemed liable to objection as irregular; but, if the matter were *proper* for a mandamus, they were aware, that in case
neither

neither were elected, the court would issue a mandamus "to proceed to an election;" in which case, as the majority of the congregation were inclined to Mends, they had no hope to support Hanmer: they therefore obstinately persisted in opposing a mandamus, and refusing a trial.

LORD MANSFIELD then said—"Every reason concurs here for granting a mandamus: we have considered the matter fully, and we are all clearly for granting it.—Here is a function with emoluments, and no specific legal remedy. The right depends on election, which interests all the voters, and the question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue or proceed to a new election, proves a determined purpose of violence: should we refuse this remedy, the congregation may be tempted to resist violence by force: a dispute "who" shall preach christian charity, may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government, and the scandal of religion. To deny this writ, would be putting protestant dissenters, and their religious worship, out of the protection of the law. This case is intitled to that protection, and cannot have it in any other mode than by means of this writ."

THE writ was accordingly issued, and the defendant made a return to it; but afterwards the parties concerned went to a new election, and the return being abandoned by consent, a peremptory mandamus was awarded (a).

WHERE, in the case of a disputed election, of which the merits are doubtful, one candidate has got possession of the office, and the other has another method of impeaching his title, the court will not grant a mandamus to admit the latter, till he has had recourse to that method

(a) *Rex v. Barker*, 3 Bur. 1265, 1379, 1380. 1 Bl. Rep. 300, 352.

with success—as in the case of corporation offices, where the title of the candidate in possession may be tried by quo warranto (*a*).

BUT where the election of the person in possession has been merely colourable, and it would be waste of time and expence to try his title formally, the court will immediately grant the mandamus in favour of the other party (*b*).

AN application was made for a mandamus to be directed to certain persons who were trustees of a dissenting meeting house at Bradford, Wilts, to restore John Lloyd to the office of minister of the congregation, and to the use of the pulpit. The application was founded on the affidavits of Lloyd himself, and of Jotham one of the trustees, which stated that Lloyd, in July, 1787, received an invitation from twenty-seven persons of this meeting on behalf of the whole congregation, to accept the office of minister, in consequence of which he procured his dismissal from another meeting of the same sect in Devonshire, and in December following publicly addressed the congregation at Bradford, signifying his acceptance of the office; that he had continued to officiate there as minister from that time till November, 1789, when he received a paper from some part of the congregation, purporting to be a dismissal of him; that since that time the doors had been shut against him; and that he had been prevented from performing the functions of his ministry, although he had offered to answer any charges that could be brought against him. They further stated, that there was an endowment for the minister for the time being, and that the defendants were trustees for receiving the rents and profits. Lloyd further deposed, that when he took upon him the office of

(*a*) *Rex v. mayor of Colchester*, 2 Term Rep. 259; the case of *Grimwood and Smithies*.

(*b*) *Vid. ante*, p. 41.

minister, he conceived that the congregation could not remove him without his consent, unless he should misbehave himself, and that the appointment was for life; and that such was the understanding of other dissenting ministers of the same communion.

THIS application was opposed, on affidavits which stated, that Lloyd had conducted himself with great impropriety and profaneness, and had made his pulpit the vehicle of personal slander on many of the congregation; in consequence of which a special meeting was held, when fifty-five of the congregation, which in the whole consisted of less than one hundred members, agreed on his dismissal, which was signified to him accordingly; they stated, that forty-three years before the present occasion, a minister had been dismissed from this meeting house for immoral conduct; that Lloyd had not obtained a proper licence as required by the act of parliament; and that amongst that sect, it was held to be absolutely necessary, after a minister had been chosen, that he should be ordained by the ministers of the baptist church, who meet once a year for that and other purposes; but that Lloyd, after his election, had never complied with this form.

LORD KENYON said, it was necessary that a party applying for a mandamus to be restored to any office, should make out a *prima facie* title to it, and shew at least that he had complied with all the forms necessary to constitute his right; but here it did not appear that the party applying had gone through all those ceremonies which the particular sect of which he was a member had made necessary.

MR. Justice Buller, alluding to the case of the King and Barker (*a*), which had been cited as an authority in favour of the application, observed, that that was the case

(*a*) Ante, p. 329—332.

of a mandamus to *admit*; and said that there was a great difference between that and a mandamus to restore; that the former was granted merely to enable the party to try his right, without which he would be left without legal remedy; but that the court had always looked much more *strictly* to the right of the party applying for a mandamus to be *restored*: that in *these* cases, he must shew a *primâ facie* title; for that if he had been before *regularly* admitted, he might try his right by bringing an action for money had and received for the profits" (a).

HERE is evidently a distinction expressed between the case of a mandamus to be *admitted*, and a mandamus to be *restored*: "that in the former, the party applying for the writ is *not* obliged to shew a *primâ facie* title; but that in the latter he must:" but this I apprehend must be taken with a considerable degree of qualification. The distinction is founded on the supposition, that, in the first case, the party applying for the writ has no other method of trying his right, but that in the latter he has. It cannot, therefore, apply to those cases, where the party applying to be restored has *no* other method of bringing his right to a trial; this is the case with a freeman of a corporation who has been disfranchised, an alderman or a common councilman who has been removed from his office.—In these there are no profits to be recovered, and, therefore, the party cannot try his title in an action for money had and received, nor has he any other remedy; *if*, then, a man may have a mandamus to be *admitted* to the freedom of a corporation, or to the office of a common councilman or alderman, without shewing a *primâ facie* title, he may also, notwithstanding this distinction, without shewing a *primâ facie* title, have a mandamus to be *restored*:

(a) Rex v. Jotham et al', 3 Term Rep. 575.

but it is apprehended, that in *all* cases, both of a mandamus to *admit* and of a mandamus to *restore*, the party applying for the writ must shew a *prima facie* title (*a*); his *right* may indeed be *contested*, but it must at least appear not *improbable* that he will succeed in *establishing* it. Had Lloyd applied for a mandamus to be *admitted*, and laid no better case before the court than he did here on his application for a mandamus to be restored, it is probable the writ would have been refused.—Indeed if *any* distinction is to be admitted between the two cases, it would seem to be rather the other way. In the case of Bloer before mentioned (*b*), it was given as one principal reason for granting the mandamus to restore, that the party had been in *possession* for eleven weeks, and there can be no doubt that he might have tried his right in an action for money had and received, for the profits.—In the case of corporation officers we have seen (*c*), that it is no answer to a mandamus to *restore*, that the party applying for the writ wanted the proper qualifications for being elected; but this would unquestionably be an answer to a mandamus to *admit*.

WHERE an act of parliament enjoins a person holding a particular place or office, within a limited time to do some particular thing, and, in default of his doing it, declares his place or office void; if, in such a case, there be no other mode of proceeding against him for disobedience, a mandamus will lie commanding the proper person to remove him. Thus, in the case of the fellows of Saint John's College, in Cambridge, before mentioned (*d*), who had omitted to take the oaths prescribed by the statute

(*a*) Vid. *Rex v. College of Physicians*, 5 Bur. 2740. *Rex v. mayor, &c. of London*, 1 Term Rep. 423.

(*b*) Ante, p. 327 et seq.

(*c*) Ante, p. 62, et vid. Say. 40.

(*d*) Ante, p. 276.

of William and Mary within the time limited, the court said, that they had no doubt but a mandamus lay in some shape, and was the proper remedy for the case; though they refused to issue a peremptory writ, because the fellows, whose removal was the object of the application, had not been made parties to the first writ (*a*).

WHERE it is *confessed* that a man has been *rightly* removed from an office, the court will not grant him a mandamus to be restored, though he had no notice to appear and defend himself, because the instant he was restored they might remove him again (*b*).

THE writ must command the person to whom it is directed, in general terms, to do that which appears to be his duty; it must not command him to execute it in a *particular* manner.—Thus, where a mandamus was granted to choose a capital burghers, and an application was made to the court that a day might be fixed for the election, or that six days notice might be given of the day: they said they would give no directions, as they could not alter the constitution of the borough (*c*).

So, when an application was made for a mandamus to churchwardens and overseers, directing them to insert *particular* persons in the poor's rate, on affidavits of their sufficiency, and of their having been left out to prevent their having votes for parliament men; the court refused

(*a*) Vid. 3 Salk. 230. Skin. 393, 397, 546, 549. In this case a quo warranto would not have lain, because the college is an eleemosynary foundation; but it would lie in the case of corporation officers who should neglect, &c. and therefore a mandamus would not be the proper remedy.

(*b*) Rex v. mayor, &c. of Axbridge, Cowp. 523. Rex v. mayor of London, 2 Term Rep. 177.

(*c*) Case of the borough of Evesham. 2 Str. 949.

it, saying they never went further than to compel the making of a rate, without meddling with the question, who was to be inserted or omitted; of which the parish officers were the proper judges, subject to an appeal to the sessions (*a*).

ON the same principle, they will not grant a mandamus, commanding the person to whom it is directed to grant administration *durante minori ætate* to any particular person (*b*): nor, where there are *several* next of kin, or where there are a widow and next of kin, to grant administration to one rather than to the other: because, in these cases, the officer to whom the writ is directed has an option (*c*).

So, a mandamus directed to the lord of a leet, in pursuance of the statute of 11 G. 1, c. 4, s. 3, commanding him to hold a court leet and summon a jury to elect a mayor, must not command him to summon *particular* jurors, but must leave him at liberty to summon what jurors he pleases (*d*).

IN the city of London, before the statute of 11 G. 1, c. 18, which regulated the elections there, it was the custom on a vacancy in the office of alderman, for the lord mayor to hold a wardmote for the election of a *new* alderman, at which all the freemen (*e*) of the ward were intitled to vote for two aldermen and two common councilmen, whom the lord mayor returned to the court of aldermen,

(*a*) *Rex v. churchwardens of Weobly*, 2 Str. 1259. Ante, p. 295.

(*b*) *Smith's case*, 22 Str. 892. Ante, p. 302.

(*c*) Ante, p. 302.

(*d*) *Rex v. Bankes*, 3 Bur. 1452. 1 Bl. Rep. 452. Ante, p. 42.

(*e*) *Qu.* Whether they must not have been housekeepers, or had some other qualification?

and that court nominated one out of the four to be alderman of that ward (*a*).

ON an election for Broad-street ward (*b*), Sir Gilbert Heathcot, who was then lord mayor, returned to the court of aldermen Sir J. Houblon, Lethillier, Conyers, and Sir G. Newland: an application was then made to the court of King's Bench for a mandamus addressed to the lord mayor, commanding him to return Sir William Withers and Lewin, aldermen, and Sir George Newland and Sir Robert Bunkley, commoners.

IN answer to the application it was observed, that there ought not to be a mandamus to return *particular* persons by name, any more than there ought to be to make a particular rate; that the court might as well direct "whom" the wardmote should elect, as "whom" the lord mayor should return; that no *such* writ had ever been granted; though it had indeed been granted, that the lord mayor should make a return, or shew cause to the contrary, but not to return *particular* persons: besides, as there was a return already made of four particular persons, if that were a false return, an action would lie for it; that if he should make a contrary return, that would of his own shewing falsify his former return, and render him liable to an action both ways; that if he obeyed the writ, an action would lie for a false return, though he made it in obedience to the writ, and the command of this court was no defence to him, because the writ was not grounded on the merits of the case, but merely on the suggestion of the party: he was liable to two actions if he obeyed the

(*a*) This seems to have been introduced by an act of common council in 3 H. 4. By the ancient constitution one only was to be returned to the court of aldermen.

(*b*) In the 10th of Anne.

writ, one on the return to the mandamus, and the other on that to the court of aldermen, and the one could not be pleaded in bar to the other: he was not concerned in interest, but was only a *ministerial* officer to collect the votes and declare which four had the majority; he was bound by his oath not to return above four persons; but now he was to be compelled, contrary to his oath and the duty of his office, to return eight: the court of aldermen was a court of record, which had authority to examine the return made to them, and reject it if it was irregular; they were not confined to the return, but were to choose one out of the persons chosen, and not out of those returned and not chosen (*a*). The lord mayor made the return as presiding officer, and the court of aldermen might inquire about the persons elected and returned before they chose one; there were many instances of the court of aldermen having rejected returns; they had rejected the same person three times successively; and where the return had been of five instead of four, or of three instead of four, they had set aside the whole return, and ordered a new election: if eight were returned, it was asked, which of them must the court of aldermen choose? They could not choose out of both the returns; they must choose out of one; and if the two were contradictory, which were they to prefer? If they were not to be considered as contradictory, they must be taken as one only, and then that consisting of more than the proper number, made this case exactly similar to that, in which the court of aldermen had given redress.—On these principles the writ was refused (*b*).

(*a*) Qu. The accuracy of this reasoning.

(*b*) Reg. v. Sir Gilbert Heathcot, lord mayor of London, Fortesc.

WHERE several persons have the same interest in having the thing done for which a mandamus will lie, they may all be joined in the same writ; as where two churchwardens are by custom chosen by the parishioners, and they apply to the official to be sworn into the office, and he refuses to swear them, they may have a joint mandamus to compel him (*a*).

So, where protestant dissenters, conforming to the act (*b*), apply to the proper officer to have the certificate registered, and he refuses, several may join in their application for a mandamus to compel him (*c*).

BUT where the interests of several are distinct, and the assertion of their rights may depend on different circumstances, they cannot join in one mandamus; thus several persons cannot join in one mandamus to be admitted to the freedom of a corporation, or to be admitted or restored to an office; because the right or the election of one is not the right or the election of the others, nor the motion of one the motion of the others, and the grounds of refusal or of motion may be different in the cases of the different persons (*d*).

BUT a mandamus may be granted in general terms, commanding the mayor, or other proper officer, to summon an assembly and do the business of the corporation. A rule for such a writ was granted on motion in the case of the mayor of Kingston upon Hull; but, in drawing up the writ, it was made out for an assembly, and to admit all persons having a right to their freedom who

(*a*) 1 Ld. Raym. 127. Churchwardens of Chelsea v. Dr. Brampston, cited from 3 Lev. 362.

(*b*) 1 Wm. and M. ft. 1, c. 18.

(*c*) 1 Ld. Raym. 125.

(*d*) Vid. 5. Mod. 10. 2 Salk. 433, 436. 3 Salk. 230. Comb. 214, 307.

should appear and demand it. On this a motion was made to supersede the writ, on the principle that every person had a distinct right, and it would be too much to oblige the mayor to make a return, that he had admitted all who had a right. The court said, the writ must be superseded, for that they had never intended to grant such a complicated *mandamus* as this (*a*).

WHERE one act is dependent on another, a *mandamus* may command both to be done. Thus where it was suggested in the writ, that, by the constitution of Abingdon, the commonalty ought to elect two out of the capital burgesses to be mayor for the ensuing year, and that the mayor, bailiffs, and capital burgesses ought to elect one of them, and that two had in fact been elected by the commonalty: and the mayor, bailiffs, and all the capital burgesses, except these two, were commanded to appoint one of them to be mayor, and the mayor to swear in the person appointed: this was held good, because the election and the swearing in were acts depending on one another (*b*).

So, a *mandamus* lies commanding the lord of a manor to *hold* a court baron, and to the homage to *present* certain conveyances of burgage tenures, on an affidavit that at a former court the homage had refused to present them (*c*).

So, it lies to the lord or his steward to *hold* a court leet, to the bailiff to summon a jury, to the steward to swear the jury so summoned and returned, that they may proceed to the election of a mayor, and do every act necessary to be done by them *respectively* for *that* purpose (*d*).

(*a*) *Rex v. mayor of Kingston upon Hull*, 1 Str. 578.

(*b*) *Rex v. mayor, &c. of Abingdon*, 1 Ld. Raym. 559, 561.

(*c*) 1 Bl. Rep. 60, 62. Vid. ante, p. 298. (*d*) Vid. ante, p. 40, 41.

IN some cases, the court will grant a mandamus on motion without a rule to shew cause. Thus, where, on a motion for a mandamus to justices of peace to allow a poor's rate, it appeared, that the rate was regularly made, and that the defendants had refused to allow it, the court, on a little consideration, made the rule absolute in the first instance, observing, that it was not proper to make a rule to shew cause, in this case, because while the rule was depending the poor might suffer, no overseer being obliged to disburse money, till he had a rate for collecting it (*a*).

So, where, on a motion for a mandamus, for proceeding to the election of a mayor of the borough of Heydon, it appeared, that there had been no election on the day appointed by charter, nor on the day after, and that the office of mayor was vacant; Mr. J. Denison, in the absence of the chief justice (*b*), observed it had been generally the practice in cases like the present, to make a rule to shew cause, but that the court were of opinion it was not necessary; and therefore the rule was made absolute in the first instance (*c*).

AND a distinction has been suggested between the case of a mandamus to swear or to admit, and a mandamus to restore, it being observed, that in the first case, if the right of the party appear plain the court will probably grant the writ on the first motion; but in the latter, they will first grant a rule to shew cause (*d*).

AND, in general, I believe, especially in cases which have not frequently occurred before, it is the practice to grant only a rule to shew cause: and this rule must always be made on the same persons to whom the writ is directed;

(*a*) Rex v. justices of Berkshire, Sayer 160.

(*b*) Ryder.

(*c*) Rex v. aldermen of Heydon. Sayer 208, 209.

(*d*) Bul. Ni. Pr. 129.

on this ground a rule, calling on churchwardens and overseers to shew cause why a mandamus should not issue directed to them and the twenty principal inhabitants of the parish, was held to be improper. The court, however, on motion, gave leave to amend the rule, saying, it would be good on new service (*a*).

AND, if the mandamus be to proceed to the election of a person to fill up a corporate office, of which a person is already in possession, the latter must be made a party to the rule (*b*).

So, if the mandamus be to remove a person from a place, which, by his default in not taking certain oaths prescribed by act of parliament, has become void, he must be made a party to the rule (*c*).

IT is reported to have been said, by Holt, that in a matter of right, as for instance, where a mandamus is prayed to restore a man to an office, the court never requires an affidavit of the fact; but that where the application is made for a supposed failure of duty in the person to whom the writ is to be addressed, an affidavit of the fact will first be required (*d*). But this distinction does not seem very intelligible; and it is apprehended, that the present practice is, in all cases, to require an affidavit.

AFTER what has been said, it seems almost unnecessary to add, that the writ is never granted as a matter of course; but that some reason must be assigned for it (*e*). It is not, however, necessary, that the party applying for it should have a clear undisputed right: it is sufficient that his right is doubtful, and the court will, in such a case,

(*a*) *Rex v. churchwardens, &c. of Clerkenwell*, 8 G. 1, id. 199, 200.

(*b*) *Rex v. Banks*, 1453, ante, p. 41.

(*c*) *Vid.* 3 Salk. 230. *Skin.* 393, 397, 546, 549. *Ante*, p. 337.

(*d*) 3 Salk. 230.

(*e*) 1 Term Rep. 425.

issue the mandamus, in order that the right may be tried on the return (*a*).

BUT the court will in no case grant a mandamus, till there has been a default : and, therefore, in the case of the King against the borough of St. Ives, where a mandamus was granted to the churchwardens and overseers of the poor, to make a poor's rate, the court would not grant a mandamus to the justices at the same time to allow it ; for they would not presume that they would not do their duty ; though the same justices had before refused to allow a rate, when a mandamus issued for that purpose, and had been taken up, but the term before, on an attachment for disobedience (*b*).

ON a motion for a mandamus to the warden of the vintners company to swear J. S. one of the court of assistants, there was no positive affidavit of his election ; it was only sworn, that he was informed, by some of the court of assistants, that he was elected, and that he had applied to inspect the court books in order to see whether he was elected or not, and was refused : The court, on account of this refusal, granted a rule to shew cause, though otherwise they would hardly have granted it ; but they said that had there been a *positive* affidavit of his election, they would have granted the writ in the first instance (*c*).

WHERE the office, to which the party applying for a mandamus to be admitted, sworn, or restored, is not of a description generally known, as those of alderman, recorder, or town clerk are, it must be specially shewn what the nature of the office is ; therefore it was refused, to swear a man who had been elected to the office of one of

(*a*) Rex. v. Dr. Bland. Bul. Ni. Pr. 200. Rex v. Everett, B. R. H. 261. Ante, p. 327, 329. (*b*) M. 8 G. 3. Bul. Ni. Pr. 199.

(*c*) M. 25 G. 2. Bul. Ni. Pr. 200.

the eight men of Ashbourn Court, because it did not appear what was the nature of the office; so that the court could not judge whether it was an office for which a mandamus would lie; but they had before granted the writ for one of the approved men of Guildford, because the nature of the office was particularly described to them (*a*).

WHERE there is a corporation by prescription, the constitution of it must be verified by affidavit. Where it is by charter, a copy of the latter must be produced at the time of making the motion. And where the application is made in behalf of a party interested, his right must also be verified by affidavit (*b*). But where, by charter or prescription, the corporate body ought to consist of a *definite* number, and they neglect to fill up the vacancies as they happen, the court will issue a mandamus for that purpose, even where no particular person is interested (*c*).

WHEN a proper application has been made and granted for a mandamus to proceed to an election on a vacancy in a corporation, it is not a matter *of course* to grant another writ for the same purpose on the application of another party: but if there be reasonable cause to suspect that the party who first applied does not really mean to carry the writ into execution, and this be particularly laid before the court by affidavit, they will grant a rule to shew cause (*d*); or will, perhaps, order a time for proceeding to the election to be inserted in the first mandamus, and make a rule, that notice of the time be given by the proper officer; and if it afterwards appear, that no election has been had on

(*a*) Anon. 2 Mod. 316, cited Bul. Ni. Pr. 199.

(*b*) Bul. Ni. Pr. 200.

(*c*) Case of the town of Nottingham. 23 G. 2, Bul. Ni. Pr. 201, *vid. ante*, p. 314.

(*d*) 2 Bur. 782. Rex v. corpor. of Wigan, or Rex v. Curghey. Sayer 105. Rex v. corpor. of Scarborough, cont. B. R. H. 179.

the day appointed, and no notice given, they will then order *another* mandamus (*a*).

THE priority of application to the court for a mandamus to go to an election, is generally casual and accidental (*b*): but where there has been a verdict against an officer of a corporation, an application cannot be made for a mandamus to proceed to elect a person to supply his place, till judgment be actually signed, and then the prosecutor in the information is intitled to the priority (*c*).

THE writ must always be addressed directly to the party who is to do the act, and not to command him to compel another to do it: therefore, where a mandamus was directed to the mayor, aldermen, and capital burgeses of Derby, and, after reciting the removal of the party complaining from his office of burges by A. and B. commanded the mayor, &c. to command A. and B. to restore him; it was quashed (*d*).

WHERE the thing required to be done, is to be done by the whole corporation, the writ must be directed to the whole, by their *corporate* name. Thus where a mandamus was directed to the mayor, *aldermen*, and commonalty of Rippon, and they returned, that they were incorporated by the name of the mayor, *burgesses*, and commonalty, the court held it bad (*e*).

WHEN the act is to be done by a *part* only of the corporation, it *may*, notwithstanding, be directed to the whole by their corporate name; and it may also be directed to

(*a*) Rex v. corporation of Haslemere, Sayer 106.

(*b*) Per Ld. Mansfield, 2 Bur. 784.

(*c*) Rex v. corporation of West Looe, 3 Bur. 1386.

(*d*) 2 Salk. 436. Vid. 2 Barnard K. 330, 350. Ante, p. 284.

(*e*) Rex v. mayor, &c. of Rippon, 2 Salk. 433.

that part *only* which is to do the act (*a*). But if it be not directed to the *whole*, by their *corporate* name, then it must not include in its direction any other persons than those who are to do the act. Therefore, where a mandamus was directed to the mayor and aldermen, commanding them to admit a person to the office of town clerk, when, in fact, it was the business of the mayor *alone* to admit him, the writ was quashed by three justices, against the opinion of Holt, who thought the addition of the aldermen only surplusage (*b*).

So, where the right of election of a town clerk was in the mayor and aldermen only, and a writ was directed to the mayor, aldermen, and *common council*, commanding them to proceed to an election, the court said they would not expect a return to this writ, because the mayor, aldermen, and common council were not the *whole* corporation, and the common council had no right (*c*).

BUT a trifling *informality* in the direction of the writ, shall not vitiate it if it be right in substance. Thus, where it appeared that the power of motion was in the mayor, aldermen, *and others of the common council*, and the writ was directed to the mayor, aldermen, *and* common council, which, it was said, inferred, that the mayor and aldermen were no part of the common council; the court said, it was true that the writ ought to be directed to the body who were to do the act, but that there was nobody in this direction but who must join in doing it; that it was only repeating the several constituent parts of the corporation, and the

(*a*) 1 Ld. Raym. 560, 561. 2 Salk. 700, Semb. 3 Salk. 231, cont. Comb. 213, acc.

(*b*) 2 Salk. 701. N. B. In this case Holt denied a case in 3 Bulstr. 190, to be law.

(*c*) Rex. v. mayor, &c. of Norwich, Str. 551

mention of the intire common council after the mayor and aldermen, was but a repetition as to the latter (a).

WHERE distinct acts are to be done by persons acting in different capacities, and a writ is directed to them in the conjunctive to do those acts, it shall be taken *reddendo singula singulis*. Thus where the right of election of a mayor was in the burgesses alone, and the power of swearing him into office in the old mayor alone, a writ was directed to the mayor and burgesses commanding them to *choose and to swear* a mayor according to their authority (b): a motion was made for a superedeas to this writ, on the ground, that the mayor could not make a return to it as directed to him to elect, nor the corporation as directed to them to swear. But the court held, that the writ was to be construed in the distributive, and that the mayor and the burgesses were to do that respectively which respectively belonged to them (c).

WHEN cross applications are made for a mandamus to go to an election by parties claiming the right to be in different persons, the court, whether they grant concurrent writs or not, will not determine to *whom* the direction shall be, but leave the party obtaining the writ to direct it at his peril; because the proper direction may depend upon the very question to be tried (d).

A MANDAMUS must not be teste'd out of term, for in this respect it is like a latitat or other judicial process; nor ought it to be teste'd of a day before it was granted by the court (e).

(a) *Pees v. mayor of Leeds.* Str. 640.

(b) *Quod eligatis et juretis majorem secundum auctoritatem vestram.*

(c) *Rex v. mayor and burgesses of Tregony.* 8 Mod. 111.

(d) *Rex v. corporation of Wigan.* 2 Bur. 784.

(e) 2 Keb. 91. 2 Salk. 434.

WITH respect to the time between the teste and return, it is said in Salkeld (*a*), that a rule was made in Michaelmas term, in the 4th of Anne, that if the corporation, to which the mandamus is sent, be above forty miles from London, then there should be fifteen days between the teste and return, but if only forty miles, then only eight days; but in a marginal note in Strange (*b*), it is said, that on a question about the practice, as to places more than forty miles from London, this rule was produced, and that it appeared to be fourteen and not fifteen days; that it appeared, indeed, to have the words *ad minus*; but these were held to mean, that one day should be inclusive, and the other exclusive, so that a writ teste'd on the 14th of November might be returnable on the 28th (*c*).

BEFORE the statute of 9 Anne, c. 20, it was the usual practice, if the party to whom the mandamus was directed, did not make a return to it at the time when it was made returnable, to issue an *alias* and a *pluries*, and after that a peremptory rule; though in extraordinary cases, where the court apprehended much mischief from delay, they would require a return to the *alias* (*d*).

IF no return was made after the expiration of the rule, the course was to grant an attachment against the persons to whom the mandamus was directed; with this difference, however, that where a mandamus was directed to a corporation to do a corporate act, and no return was made, the attachment was granted only against those particular persons who refused to pay obedience to the mandamus: but where it was directed to several persons in their natural capacity, it issued against all, though when before the court

(*a*) 2 Salk. 434. 11 Mod. 64.

(*b*) 1 Str. 407.

(*c*) Rex v. mayor and jurats of Dover. 1 Str. 407.

(*d*) Salk. 434. Skin. 669.

the punishment was proportioned to the offence (*a*).

Thus, where a mandamus was directed to two bailiffs, of whom one was for obeying the writ, and the other would neither obey it, nor join in a return; the court granted an attachment against both, observing, that it would be endless, in all cases, to try who was in the right, and that such disputes might be always used as a pretence for delay (*b*).

THE inconvenience arising from the delay in not granting an attachment for not returning a mandamus, till after a pluries had issued and been disobeyed, gave rise to the statute 9 Anne, c. 20, by which, after reciting, "that persons who had a right to the offices of mayor, portreve, bailiff, and other offices in cities, towns corporate, and boroughs, or to be burgeses or freemen there, had been either illegally turned out, or had been refused admission, and had, in many cases, no other remedy to procure themselves to be respectively admitted or restored to their offices or franchises, than by writs of MANDAMUS, the proceedings on which were very dilatory and expensive;" it was enacted, "that after the first day of Trinity term, in the year 1711, where any writ of mandamus should issue out of the Queen's Bench, the courts of sessions of counties palatine, or out of any of the courts of great sessions in Wales, in any of the cases *aforesaid*, such person or persons who, by the laws of this realm, are required to make a return to such writ of mandamus, should make his or their return to the *first* writ.—s. 1."

AFTER this statute, the court taking the rule here laid down in the case of corporations, as an example, began to adopt it in all cases whatever: it is, therefore, now the

(*a*) Rex. v. churchwardens, &c. of Salop, H. 8 G. 2. Bul. Ni. Pri. 201, vid. Comb. 208.

(*b*) Case of the bailiffs of Bridgenorth. 2 Str. 808.

usual course, even in cases not within the statute, to grant a rule to return the *first* writ. But the application for that rule must be founded on an affidavit of the *service* of the writ (*a*).

THE rule to return the writ is usually a four days rule: but where the writ is directed to a person in town, he may be called upon, at any time after the return day, to return it immediately: the court having, on conference with the clerks of the crown office, declared, that there was no stated time for these rules, but that the distance of the place ought to be the guide (*b*).

IF the rule to return the writ be disobeyed, an attachment issues in the same manner, and against the same parties as before the statute. But cause may be shewn against the rule, and if there appear to be any real difficulty, the court, instead of compelling a return, will put the matter in another way of trial.—A mandamus had issued, directed to the mayor and jurats of Rye, commanding them “to admit and swear Edwin Wardroper into the office of one of the jurats of that corporation, or to shew cause why they refused to admit him.”—The writ not having been returned at the proper time, the mayor and jurats were called upon to shew cause, why an *attachment* should not issue against them. They shewed for cause, that the mayor claimed a sole and exclusive right to nominate this jurat, and the jurats denied that the mayor had any such sole and exclusive right, so that it was impossible for them to *join* in a return; unless either the one or the other should give up the right on which they insisted: that the jurats wished to return, that Wardroper was *not* elected: that the

(*a*) *Da Costa v. the Russian company*, 1 Barnard, K. B. 24.
2 Str. 783. Fitzg. 4.

(*b*) *Rex v. Bettsworth*, 2 Str. 857.

mayor refused to join in *this* return, and the jurats could not force him.—It was observed too, that an attachment would answer no purpose, because when the defendants were examined on interrogatories, the question would appear to be a mere question of right. It was, therefore, proposed on the part of the jurats, and assented to on that of the mayor, that the question, “Whether Wardroper was duly elected or not,” should be tried in a feigned issue (*a*).

IF a mandamus be directed to a mayor, bailiffs, and burgessees, the mayor alone, as the head of the corporation, *may* make the return, and the rest cannot disavow it, though it was made without their consent; but in such a case, if the return be false, the mayor may be punished as for a high misdemeanor (*b*). So, the court will not interfere to prevent the mayor from executing the writ, though the rest of the corporation wish to return an excuse, but will leave the corporation to take their measures against him (*c*).

THE first writ of mandamus, in general, concludes with commanding obedience, or cause to be shewn to the contrary, “*vel causam nobis significes:*” and this seems to have been the established course as early as the case of James Bagg (*d*). But it seems that the omission of this clause “*vel causam nobis significes,*” does not make the first writ peremptory, nor preclude the party to whom it is directed, from making a return and traversing the facts alleged in the writ; more especially if there be any expression in the latter, which seems to admit a doubt about the facts, such as “*si ita est,*” “*sicut informamur.*”

(*a*) *Rex v. mayor and jurats of Rye*, 2 Bur. 798.

(*b*) *Case of the mayor, &c. of Abingdon*, 2 Salk. 431.

(*c*) *Case of the mayor of Norwich*, 2 Salk. 432.

(*d*) *Vid. 1 Rol. Rep. 173, 224. 11 Co. 93. Ante, p. 50.*

IN the case of St. John's College, in Cambridge (*a*), before mentioned (*b*), the mandamus suggesting, "that divers fellows had not taken the oaths prescribed by the st. 1 W. and M. within the limited time, by which their fellowships had become vacant, notwithstanding which they continued to reside within the college, and received the profits and benefit of their fellowships, *sicut informamur*," then commanded the president to remove those fellows from the college, and to certify "qualiter hoc breve execut."

ON the part of the college, it was prayed, that the writ might be quashed, "quia improvide emanavit;" and the ground of the application was, that there being no clause of "vel causam nobis significes," or "si ita est," the writ was peremptory in the first instance, which precluded the parties from being heard or making a return, as it would be a contempt to the court to make any other return than that they had paid obedience to the writ. But it was answered, by the court, they might make a return, and answer the suggestions of the writ if they were false, for that this was not a peremptory writ, as it had the words "*sicut informamur*."

AND afterwards, in the case of the King and Owen (*c*), on shewing cause why an attachment should not issue against the defendant for not making a return to an "alias mandamus" it was objected, that the clause "vel causam nobis significes" was omitted, and that therefore the writ was peremptory, and did not give the liberty of being heard, the court overruled the objection, and ordered a return to be made.

IF the writ vary from the rule by which it was ordered to issue, it will be superseded; as if the rule be that a manda-

(*a*) Skin. 359.

(*b*) Ante, p. 276.

(*c*) Skin. 669.

mus shall go to the clerk of a company, to deliver to the *new clerk* all books, papers, &c. belonging to the company, where it ought to be to deliver them to the company, yet, if on that rule, the mandamus be actually made out to deliver them to the company, the writ will be superseded, and an application for a new rule become necessary (*a*).

IF it appear by the writ, that there is another remedy to procure the thing to be done which it commands, it will be quashed. Therefore where a writ directed to Dr. Walker as vice-master of Trinity College, in Cambridge, commanded him to put in execution a sentence of the bishop of Ely, whom it recited to be *general* visitor of the college, it was quashed on the ground, that the visitor could compel the execution of his own sentence (*b*).

THE writ must contain convenient certainty in alleging the duty to be performed; but it is not necessary, that it should shew by what authority the duty exists (*c*).

A MANDAMUS directed to the mayor and burgessees of Nottingham, after reciting, "that for time immemorial there had been, and that there ought to be, a common council, consisting of twenty-four persons, and that there were now six vacancies in the common council," commanded the defendants to elect six persons to fill up these vacancies.

IT was objected to this writ, that it did not set forth with sufficient particularity the *nature* of the right, whether by charter or prescription, to have a common council, consisting of twenty-four persons; but the objection was overruled, there having been many precedents, where the thing commanded to be done, was set out as generally

(*a*) 2 Str. 880. Vid. 1 Barnard, K. B. 402.

(*b*) Dr. Walker's case, B. R. H. 212, ante, p. 282, 283.

(*c*) Bul. Ni. Pri. 204.

as in the present mandamus, and no *precise* form being necessary for these writs (*a*).

So, where the writ suggested, that every person being the son of a freeman, and born after his father had been sworn, had a right to be admitted a freeman on paying a *reasonable* fine; this was held sufficient, without shewing in what manner or by whom the fine was to be assessed (*b*).

THE writ must shew, that the party who prosecutes it, has complied with every thing which it suggests to be necessary to complete his title to the thing commanded; but it is not necessary that his compliance should be directly averred; it is sufficient if it appear by implication.

THUS, where a writ alleged, that within the town of Cambridge there was a custom, that every person, being twenty-one years old, who had served an apprenticeship for seven years in any trade, with any freeman within the said town, such freeman living during the time of the apprenticeship in the said town, *and such apprentice living with his master during his apprenticeship*, had a right to be admitted a freeman; that the prosecutor was twenty-one years old, and had served an apprenticeship in the trade of a gardener, for seven years, with Matthew Blakney, deceased, *the said Matthew Blakney being a freeman of the said town, and having lived during such apprenticeship within the said town*: it was objected, that it was not *positively averred* by these latter words, that the master of the prosecutor was a freeman, and *continued so* during the apprenticeship. But the court were unanimously of opinion, that the objection should be overruled (*c*).

(*a*) Rex v. mayor &c. of Nottingham, Sayer 36.

(*b*) Moore v. mayor of Hastings, B. R. H. 353, 362.

(*c*) Rex v. Whislin, Andr. r.

It is not necessary, that the writ should *expressly* allege, that the person to whom it is directed, is the person who ought to do the act commanded; yet it must appear either *expressly* or by plain *implication*.

THIS objection was taken in the case of the King and Dr. Ward, which was a mandamus directed to the doctor, who was commissary of the court of the archbishop of York, commanding him to admit Henry Dryden to the office of deputy register in that court: but it was answered, that notice was taken in the writ, that *application* had been made to the doctor to admit Mr. Dryden; that he had unjustly refused; and that his refusal was laid to be in contempt of our Lord the King; and it was said it was impossible this could be applied to the doctor unless he had been the person who was bound to admit to this office—It was observed too, that the writ did not absolutely require the defendant to admit the prosecutor; but if he did not, to shew the reason of his refusal: if, therefore, it was argued, he was not, in fact, the person who was bound by law to admit him, he might have alleged that in his return, and it would have been a good return; but instead of this, he had returned, that he was inhibited by the archbishop, which was a strong confession, that otherwise he should have thought himself bound to admit him. It was likewise observed, that in the precedents of writs of this kind, the express averment was as often omitted as inserted (a). For these reasons the court held the writ to be sufficient.

So, where a mandamus commanded the defendant, as judge of the prerogative court of Canterbury, to grant probate of the will of Lord Londonderry to his executors, which he had *contra juris exigentiam* refused, and ex-

(a) 1 Barnard, K. B. 411. 2 Str. 879.

ception was taken to the writ, because it only alleged that the earl had bona notabilia at Westminster, and in *divers other places*, but did not say within the province of Canterbury, in which case only the defendant could grant the probate, the court held that the suggestion that he had *contra juris exigentiam* refused, was sufficient; and observed besides, that as it appeared he had already done some acts of office as the prerogative judge, he should not now be permitted to say he had no jurisdiction (*a*).

WHETHER it be a good objection to a mandamus, that it is argumentative, does not appear to be determined.

A MANDAMUS directed to the mayor, &c. of York, stated, that the office of recorder of that city was an ancient office; that on the 15th of January, 1789, it was vacant; that it belonged to the mayor, aldermen, and sheriffs, and those who *had* been sheriffs, and the common council of the city for the time being, in common hall duly assembled, or the major part of them so assembled, to elect a recorder: that by a charter granted to the mayor and commonalty of the city by King Charles the second, it was among other things willed and declared, that no recorder of the city, to be thereafter chosen, should be admitted to such office before he had been approved by his Majesty, or his heirs and successors; and that this charter was by the said mayor and commonalty duly accepted: that on the 15th of January, 1789, the then mayor and sheriffs of the city, and the major part of the then aldermen, those who had been sheriffs, and the common council, being duly assembled in the common hall of the said city, proceeded to the election of a recorder; at which election William Withers, Esq. being duly qualified for

(*a*) *Rex v. Dr. Bettelworth.* 2 Str. 857. Bul. Ni. Pri. 204.

that

that office, and Robert Sinclair, Esq. were respectively proposed as candidates: that at the said election fifty-one of the persons so assembled gave their votes for Mr. Withers to be recorder, and fifty others, together with one James Brown, who then usurped the office of one of the common council of the city, voted for Mr. Sinclair; that an information, in the nature of *quo warranto*, had since been exhibited in the court of King's Bench against James Brown for his said usurpation, charging him with exercising the place, office, and franchise of a common councilman of the said city, without any legal warrant: that on this information Brown was afterwards convicted of the premises charged against him, and by the consideration of the court was forejudged and excluded from the aforesaid office, place, and franchise of a common councilman of the said city, as by the record would appear: "by reason of which said premises, the said William Withers was elected into the said office of recorder of the city, by a majority of the persons present at the election, who had a legal right to give their votes at the said election."

It was objected, that as to the election of Withers, the writ was merely argumentative, and therefore bad; that it was a rule in pleading that *facts* and not *evidence* of facts should be stated; that this writ contained evidence to support the fact, but not the fact itself, that Withers was elected recorder: it stated that the corporation were duly assembled; that Withers and Sinclair were candidates, and that there were fifty votes for the one and fifty-one for the other: but it did not follow from thence that Withers was elected by a majority of votes, for that, consistently with every thing here stated, there might have been another candidate for whom fifty-two votes were given, as it did not appear how many voted in the whole.

THE court did not expressly decide on this objection, on the ground that it was taken at an improper period of the proceedings; but Mr. Justice Buller said, "he was by no means satisfied that the writ was improper, for that if the fact suggested, that another candidate was chosen by a majority of votes, was true, it might have been returned (*a*).

WHEN a mandamus is returned, the course is, to move that the return may be made a concilium (*b*).

TILL lately it has been generally understood, that the proper time for taking exception to the writ, is after the return made, and before it be filed (*c*), and this is expressly laid down as the rule by Mr. Justice Buller in his Law of Nisi Prius (*d*).

IN the case of Saint John's College before mentioned (*e*), Holt is made to say to the counsel, "return the writ, and when it is of record before us then we can judge of it, and the objection may be saved to you when the return is made."

IN the case of Owen, which followed soon after this (*f*), the court again said, that the return might be made, and then exception taken to the writ, for that the court had nothing before them till the return, and observed that they had ordered the same thing to be done in the case of Saint John's College.

IN almost every subsequent case it appears, that the exceptions to the writ are taken and argued at the same time that exceptions taken to the *return* are argued (*g*): and

(*a*) *Rex v. the mayor, &c. of York*, 5 Term Rep. 66, 73, 75.

(*b*) Comb. 289. (*c*) 1 Sid. 31.

(*d*) Bul. Ni. Pri, 205, cites 5 Mod. 314.

(*e*) Ante, p. 354. (*f*) Ante, p. 354. and 5 Mod. 314.

(*g*) Vid. 5 Mod. 420. 1 Ld. Raym. 559. 2 Str. 893. B. R. H. 212. Sayer, 37. 5 Bur. 2742.

there

there seems to be a good reason for this rule ; for many objections to the writ which might seem to have some weight before the return, may be cured by the return itself. This rule was recognized in the case of Withers before mentioned (a) ; for there the counsel for the defendants attempted to take exception to the writ before it was returned, and were told in express terms by the court, that the proper time to do so was not yet come, and that they must first make a return and *then* take their exceptions :—and yet in this very case, when the counsel, after the return was made, attempted *again* to take their exceptions to the writ, they were told by the chief justice, with the concurrence of some of the other judges, “ that they were now too late : that the corporation, by making a return, had precluded themselves from taking exceptions to the writ : that it was for the convenience of suitors and of the public that such objections should be made at the proper season : and that it ought not to be permitted to any party to increase the expences of litigation by proceeding in the suit, when he himself thinks that there is an exception *in limine* to the proceedings altogether” (b).

IF there be any analogy between writs of mandamus and pleadings in other cases, either what the chief justice here says is ill founded, or the uniform practice in all other cases has been wrong ; for in all other cases either party is permitted to take exception to any *former* part of the pleadings, though the matter comes before the court in a subsequent stage, and though he might have demurred in the first instance.

THE proper time, however, to apply for a *superfedeas* to the writ, on account of mis-direction, or variance from the rule by which it is granted, seems to be the moment

(a) 358.

(b) 5 Term Rep. 74.

the mistake is discovered (*a*); for this resembles the case of an application to set aside a writ for irregularity.

It is not necessary that a return to a mandamus directed to a corporate body, should be made under the common seal, nor is it necessary that it should be signed by the head of the corporation: it is sufficient that there be an indorsement, as a title to the return, by such words as these,

‘the answer of such and such persons,’ the parties to whom the writ was directed, in the words of the direction (*b*): for, it is said, when the writ is filed they shall be estopped to say, that it is not their return, and if any other shall have made it for them, they may have their remedy by action on the case (*c*).—But in other books it is only said, that no other evidence is necessary to prove the return to be the mayor’s, than the copy of the writ and the return of it in the Crown Office: that though on consultation the majority of the corporation be against the mayor, and make a return in his name, yet it shall be taken to be his, if he do not come and disavow it: and that it is not necessary to prove the delivery of the writ to the mayor, though it is to be delivered to him as the most visible part of the corporation (*d*):

If a writ be directed to a corporation by a wrong name, they may return this specially, and take advantage of it; but if they answer the exigency of the writ, they cannot then object to the writ on account of the misnomer (*e*).

If the writ be directed to the whole corporation, and the return purport to be only by a part; as if it be di-

(*a*) Vid. Str. 55. 2 Str. 879.

(*b*) Rex v. St. John’s College, Skin. 368. Rex v. mayor of Exeter, 1 Ld. Raym. 223. Reg. v. mayor of Thetford, 2 Ld. Raym. 848. Contr. 3 Keb. 350, 764.

(*c*) Skin. 368. (*d*) Reg. v. mayor of Bath. 6 Mod. 152.

(*e*) Salk. 433. 2 Ld. Raym. 1233. 1 Keb. 623.

rected to the aldermen, bailiffs, and commonalty, and the return by the bailiffs and capital burgesſes, this is ill; be-
cause one part of the corporation might make one return,
and the other part another (*a*).

THE court will not grant an application to have
the return to the mandamus made upon oath; though
there are precedents in former times of returns being ſo
made (*b*).

IF the return on the face of it be good in point of law,
but the matter of it falſe, the party injured may have an
action on the caſe for a falſe return. And where the re-
turn is made by ſeveral, the action being founded on a tort,
may be either joint or ſeveral: and though the return be
made in the name of the corporation, yet an action will lie
againſt the particular perſons who cauſed the return to be
made: and though the writ be directed to the mayor and
aldermen, and the return be made in their name, yet the
action for a falſe return may be brought againſt the mayor
alone: but, in ſuch a caſe, if it appear on evidence that
the defendant voted againſt the return, but was over ruled
by the majority, the plaintiff will be non ſuited (*c*).

BUT it ſeems that the plaintiff, before he bring this ac-
tion, muſt procure judgment to be entered on the return,
and declare upon that (*d*).

IN an action for a falſe return, the court is not to inquire
whether a mandamus *ought* to have been granted or not:
it is enough that the mandamus was actually granted, and
that the return was falſe (*e*).

(*a*) 1 Keb. 34.

(*b*) Latch. 123. 1 Sid. 257. 1 Ventr. 303. Raym. 365, 366.

(*c*) Carth. 171, 229. Salk. 374. 1 Ld. Raym. 564.

(*d*) 2 Lev. 238, 239.

(*e*) 1 Ld. Raym. 126.

WHERE several have joined in suing the mandamus, they must all join in the action for a false return, because the damages are joint, and the expences of suing the mandamus are joint (*a*).

IF the matter concern the public government, and no particular person be so interested as to maintain an action, the court of King's Bench will grant an information against the person making the return (*b*).

AND if in such an action or information the return be falsified, the court will grant a peremptory mandamus: but no motion can be made for it till four days after the return of the *postea*, because the defendants have so long time to move in arrest of judgment (*c*).

THE action for a false return of a mandamus has two objects; the recovery of damages and charges expended in prosecuting the mandamus, and the obtainment of a *peremptory* mandamus: but if the action for the false return be brought in any other court but the King's Bench, the first object alone will be answered; for the court of King's Bench will not grant a peremptory mandamus on a return falsified in any other court (*d*), and the reason given for this distinction is, that the peremptory mandamus recites the fact *prout patet per recordum*, which can be true only of records in the King's Bench, as that court can take no notice of records in other courts (*e*).

A WRIT of error lies on the judgment in an action for a false return, and, while it is depending, operates as a *superfedeas* to a peremptory mandamus, which consequently cannot issue till the question be ultimately determined in favour of the plaintiff in the action (*f*),

(*a*) 1 Ld. Raym. 127. (*b*) Salk. 374. 6 Mod. 152.

(*c*) Salk. 430. (*d*) 1 Ld. Raym. 125. 3 Lev. 363. 2 Salk. 428.

(*e*) 1 Ld. Raym. 128. 2 Salk. 428. Skin, 670. (*f*) 2 Str. 983.

BEFORE the statute 9 Anne, c. 20, if the party to whom the writ was directed made a return sufficient in law, however false in point of fact, the court could not award a peremptory mandamus, till it was falsified in an action or information (a).

BUT by that statute it is enacted, "that as often as in any of the cases of persons having a right to the office of mayor, bailiff, portreeve, or other offices in cities, boroughs, and towns corporate, or to be burgessees or free-men thereof, who have either been illegally turned out, or have been refused to be admitted, a writ of mandamus shall issue out of any of the courts mentioned in a former part of the statute, and a return shall be made thereto, it shall and may be lawful to and for the person and persons suing or prosecuting such writ of mandamus, to plead to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur, and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had, if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ, shall and may try the same in such place as an issue joined in such action on the case should or might have been tried: and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in such action on the case;

(a) 11 Co. 99. b. 1 Keb. 20. Latch. 232. Style; 481. Palm. 455. 3 Keb. 350, 859. Raym. 365.

such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit*; and a peremptory mandamus shall be granted, without delay, for him or them for whom judgment shall be given, as might have been granted, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit to be levied in manner aforesaid. s. 2.

BUT the courts may grant such convenient time to the parties to make the return, plead, reply, rejoin, or demur, as they shall judge to be just and reasonable. s. 6.

PROVIDED, that if *any* damages shall be recovered by virtue of this act, against any such person or persons making such return to such writ, as aforesaid, he or they shall not be liable to be sued in any other action or suit for the making of such return. s. 3.

THE statute for the amendment of the law (*a*), and all the statutes of jeofayles, are extended to *all* writs of mandamus, and the proceedings thereon. s. 7.

IT was formerly held, that when a return to a mandamus was filed, it could not be amended, whether it had been filed on motion or by the regular course of the court, though the application was made in the same term in which the return was filed; and the reason assigned was this, that the rule "by which the acts of the court are supposed to remain in the breast of the court during the same term," did not apply to this case, because the return was the act of others, and not that of the court (*b*). But it has been lately held, that *clerical* mistakes may be amended *after* the return is filed (*c*).

IF

(*a*) 4 Ann. c. 16.

(*b*) Style, 33, 35, 87.

(*c*) Doug. 130, (135). A mandamus issued to restore R. F. in lcc' et officium unius communis concilii et un' alderman' civitat' Cicester' —

IF, on a proceeding under this statute, no damages be given by the jury, the want of it cannot be supplied by a writ of inquiry, nor can any judgment be given, nor a *peremptory* mandamus be issued.

A MANDAMUS having been awarded to the corporation of Shrewsbury (*b*), commanding them to restore Mr. Kinaaston to the office of alderman, they made a return to which Kinaaston took five several traverses, and issue being joined on all these, the jury found a general verdict for Kinaaston on two, and a special verdict on the three others, but found no damages: on the special verdict the court gave their opinion in favour of Kinaaston; and a rule was pronounced for a *peremptory* mandamus: but when the plaintiff prepared to enter up judgment, he discovered the omission of damages, and consequently that there could be no judgment for costs. To supply this defect an application was made for a writ of enquiry, which the court said they were restrained from awarding, by the words and construction of the statute; because by that the traverses were given in the room of an action for a false return, and the proceedings were strictly confined to be in the same manner as in such an action; so that the question was reduced to this, whether, on a special verdict in an action for a false return, if no damages had been given, the court could have supplied that omission by a writ of inquiry, and as it was clear they could not, so neither could they in this.

ter'.—The return was, that F. non fuit electus et præfectus in locum et officium communis concilii ac un' alderman' civitat' Cicester'.—The counsel for the mayor to whom the writ was addressed, applied to the court for leave to add "vel aliquem eor"—and as this was a mistake of the clerk of the crown office, his instructions being general, leave was granted. 1 Show. 273.

(a) Vol. I, p. 436, 438.

Kinaſton, however, cauſed a judgment to be entered in theſe words. "It is conſidered by the court, that the return is not ſufficient in law to bar or preclude the ſaid Corbet Kinaſton from being reſtored to the ſaid place or office of one of the aldermen of the ſaid town, and that the ſaid return, for the reaſons aforeſaid, be diſallowed and quaſhed."

On this the corporation brought a writ of error in the Houſe of Lords, and there two queſtions were put to the only judges then attending (*a*). Firſt, Whether, as no damages were given, *any* judgment could be entered? And, ſecondly, Whether, as no damages were given, the plaintiffs in error would not be ſubject to an action, which would be a double vexation? To the firſt they answered, that *no* judgment could be entered, and declared, that no waiver or remiſſion of damages below could have ſet the verdict right, for then there would be nothing for which judgment could be given, the proper entry being only a judgment for damages and coſts, and the *peremptory* mandamus going by *rule* for him for *whom* judgment is given.—To the ſecond they answered, that an action for a falſe return might ſtill be brought, as the ſtatute took it away only in caſe *any* damages were given by the jury who tried the tra-verſe.

THE judgment was therefore reverſed, and a *venire facias de novo* directed to be awarded by the court of King's Bench (*b*).

THE perſon injured by a falſe return may ſtill have his action, inſtead of having recourſe to the proceedings given by this ſtatute: as an information may ſtill be granted

(*a*) C. J. Willes, J. Denton, and B. Thompson.

(*b*) Kinaſton v. mayor, &c. of Shrewſbury. Str. 1051. B. R. H. 295, 377. Vid. the proceedings on the *venire de novo*, in Andr. 85, 104, 171, 320.

against the persons making the return, in those cases in which no particular person is so interested as to bring an action: but the return must be filed and allowed before an application can be made for the information (*a*).

THIS statute extends only to the cases of officers and freemen of corporations; and, therefore, in all other cases the proceedings must be according to the course of the common law.

SINCE this act, a mandamus is considered in the nature of an action, and a writ of error will lie upon it (*b*).—The plaintiff had applied for a mandamus to be admitted (or sworn) into the office of mayor of Truro; the mandamus had been granted, and a return made to it, to which the plaintiff had replied, and issue had been joined; a trial at bar had been had; judgment had been given in the King's Bench in favour of the defendant; on a writ of error in the Exchequer Chamber, this judgment had been reversed, and the reversal confirmed in parliament. The plaintiff then applied for a *peremptory* mandamus, insisting that he had now falsified the return, and consequently set aside the defendant's excuse: to this it was objected, that a *peremptory* mandamus ought not to issue, unless beside the reversal of the judgment given for the defendant, there be also a new judgment given for the plaintiff, which was not the case here; that a *peremptory* mandamus was a judicial writ, and must be founded on some judgment establishing the right of the party who applied for it. But the court were unanimously of opinion, that a *peremptory* mandamus should be awarded, observing that it was not a judicial writ founded on the record, but a mandatory writ, which the court always granted when they were satisfied

(*a*) Salk. 374. Rex v. mayor, &c. of Nottingham, H. 25 G. 2.
Bul. Ni. Pri. 203. (*b*) 8 Mod. 29.

of the right of the party; that the reversal of their judgment was a declaration of a superior court, that the plaintiff had a right, and that there was no occasion for any new judgment (*a*).

It has been held, that a writ of error on a judgment in proceedings on a mandamus under this act, is not a superseas to a *peremptory* mandamus, on the ground that if it were, the end of the statute would be defeated, and the officer who was chosen for a year be prevented from having any fruit of his writ (*b*): yet the propriety of this may be doubted, as there seems to be no essential difference between a writ of error in this case, and a writ of error on a judgment in an action on the case for a false return (*c*), in which latter case it has been seen (*d*) that a writ of error is a superseas.

A WRIT of error will not lie on the first or on the *peremptory* mandamus; not on the first, because that is in the nature of an interlocutory judgment, of which error will not lie, but the party must wait till the cause is determined (*e*): not on the *peremptory* writ, both for *technical* reasons and reasons of convenience: for technical reasons, because a writ of error does not lie but on that which is properly a judgment; but the award of a *peremptory* mandamus is not in the terms of the award of a judgment; there is no *ideo consideratum est*, which is essential to the form of the latter: a writ of error, too, is calculated to restore the party to something he has lost, but a mandamus gives no right, not even a right of possession, so that if the judgment should be reversed, still the same right would subsist, which makes the reversal signify no-

(*a*) Foot v. Prowse. 1 Str. 625, 697. (*b*) 1 P. W. 351.

(*c*) Bul. Ni. Pri. 204. (*d*) Ante, p. 354.

(*e*) 1 Str. 540.

thing: for reasons of convenience, because there would be no end to proceedings, if every person who was intitled to a mandamus, should be delayed by writs of error (*a*).— Neither will a writ of error lie on the allowance of the *return* to a mandamus (*b*).

IF a mandamus be directed to a mayor in possession, commanding him to admit another as mayor, the mayor in possession, it is said, cannot have a rule to see the charter, on the suggestion that the party applying to be admitted was not duly elected, because he may return that he was not elected; and in an action for a false return he shall have a rule to see the charter and take a copy (*c*).— But this seems rather a hard measure of justice, to deny the means of ascertaining the truth of what he is to return, and when he has at his hazard made a false return, give him the means, perhaps, of convicting himself, whereas if the same permission had been granted to him at first, he might have made a different and a true return; or he might have seen that he had no ground for refusing obedience to the writ, and might have admitted the party complaining without resistance.

IT is laid down as a general rule, that a *ministerial* officer must obey the writ.—Thus, where a mandamus was directed to the archdeacon of Colchester, commanding him to swear Rodney Fane into the office of churchwarden, and he returned, that before the coming of the writ, he received an inhibition from the bishop of London, with a signification that the bishop had taken upon himself to act in the premises: beside the objection that it did not appear that the town of Colchester was within the diocese of the bishop of London, of which the court could not

(*a*) 1 Str. 543. 8 Mod. 27. 1 P. W. 349. Fortesc. 329.

(*b*) 1 Str. 628.

(*c*) Vid. Salk. 430.

judicially take notice, which alone was thought a sufficient objection to the return ; it was further held, that the arch-deacon was but a ministerial officer, and was bound to execute the writ, whether it would be of any validity or not (*a*).

So, to a similar mandamus it being returned, that before the coming of the writ he had sworn in another ; this was held a bad return ; for that, be the right which way it might, the officer was to do his duty (*b*).

So, where a mandamus commanded the defendant to swear in *Lodge* churchwarden of Temple Holy Cross, in Bristol, and he returned, that in a suit depending in the bishop's court, he himself had decreed in favour of *Whit-church*, and that an appeal was lodged and was depending : this return was quashed, and a peremptory mandamus was awarded (*c*).

To a mandamus directed to Dr. Ward, commanding him to admit Henry Dryden to the office of deputy register of the court of the archbishop of York, the doctor returned that John Shaw had formerly been appointed deputy, and had been admitted and executed the office till suspended, for the reasons set out in the return, for five years, for which time Joseph Leech, a notary public, had been appointed before Dryden had been constituted deputy. That Shaw appealed, and in that appeal alleged, that the 23d of May, 1728, he resigned the office, and that Dr. Sharpe had appointed William Smith to be deputy : that delegates were appointed, who, on the 23d of October, 1728, issued an inhibition to Dr. Ward, as commissary, that pending the appeal he should do nothing to the pre-

(*a*) *Rex v. Symphon.* 1 Str. 608. 2 Ld. Raym. 1379. 8 Mod. 325.

(*b*) *Taylor v. Raym.* cited 2 Str. 895.

(*c*) *Rex v. Reynell*, Tr. 8, 9 G. 2, B. R. cited 3 Bur. 1422.

judice of the appellant : that the appeal remained undetermined ; and that for these reasons he could not admit Dryden to be deputy of Dr. Sharpe.

THE court said this return could not be supported ; that the effect of the mandamus was not to *give* a right, but to enable the party to *assert* his right ; that a ministerial officer must execute the writ, let the consequence be what it might ; and that to allow to the power of inhibitions the effect for which the return contended, would be too much (*a*).

A MANDAMUS was directed to Dr. Harris, commissary of the consistorial and episcopal court of the bishop of Winchester, for the parts of Surrey ; setting forth, that Henry Griffith and Thomas Garner were in Easter week then last past duly nominated and elected churchwardens of the parish of St. Olave, Southwark, to serve for one whole year then next ensuing, according to the ancient usage and custom of the said parish ; and that they had often offered themselves to the doctor to take their corporal oath as churchwardens, and requested to be by him sworn and admitted into the said place and office, which oath the doctor refused to administer to them : the writ therefore commanded him, without delay, to swear and admit, or cause to be sworn and admitted, the said Henry Griffith and Thomas Garner into the said place and office, together with all the liberties and privileges thereto belonging and appertaining ; *or shew cause to the contrary.*

A LIKE mandamus was also directed to him, to swear and admit David Griffin, Philip Cox, Isaac Applebee, and William Strickland into the *same* office.

(*a*) Rex v. Ward, 2 Str. 893. Ante, p. 357. 1 Barnard. K. B. 294, 380.

To the first writ he returned, that there were two causes depending before him, which had afterwards been consolidated into one; in which it was disputed "*who* were elected churchwardens?" The former, on the promotion of Griffin, Cox, Applebee, and Strickland, asserting *themselves* to have been duly elected, and praying to be sworn; the latter on the promotion of Griffith and Garner and two others, against Griffin, Cox, Applebee, and Strickland: and that the parties on each side reciprocally denied the others to be duly elected: that for these reasons he could not, *consistently with his duty and the law and practice of the episcopal court*, swear and admit, or cause to be sworn and admitted the said Henry Griffith and Thomas Garner into the place or office of churchwardens of the parish of St. Olave, Southwark, *until* it should have been judicially determined in the cause then depending before him, according to allegations given and proofs made thereon, "that the said Henry Griffith and Thomas Garner were duly elected into such office:" all and singular which said things he submitted to the judgment of the court."

THE return to the other writ was to the same effect, only that after the words "were duly elected into such office," was added "by a majority of legal votes."

LORD MANSFIELD said, "this is an indecent return.—He has no right to try the question; he cannot try the legality of the votes. The King's writ commands him to admit and swear: and he must obey it."

IT being then observed that there were two cross mandamus's, and that he did not know which to obey; the court answered, "he must obey *both*. It is without prejudice to the right of either claimant."

THE court then proposed, and the parties consented, to try the right in a feigned issue; and that the *execution* of
the

the peremptory mandamus should be *suspended* till after the trial (a).

BUT if this rule, "that a ministerial officer must at all events obey the writ," be taken in the strict literal sense of the words, it will involve this absurdity, that *no* return can be made to the writ at all; which contradicts the tenor of the writ itself: for by that he is commanded in the alternative to do the thing required, or *to shew cause to the contrary*.

IN fact there have been many cases in which a return to such writs has been allowed.

IN the case of the King and White, the return to a mandamus commanding the defendant, as archdeacon, to swear a churchwarden, the return was *non fuit electus*, on which Mr. Justice Fortescue said, "that it was settled, and had been often ruled, that the archdeacon could not judge of the election, and therefore this return was bad:" on which a peremptory mandamus was granted. "But note," says Lord Raymond, who reports the case, "this was certainly wrong, for the return was a good return, and has often been made to such writs of mandamus, and actions brought upon the return" (b); and in a subsequent case, which occurred the same year, the authority of this case of White was again denied. This was a mandamus directed to Dr. Harwood, as commissary of the dean and chapter of St. Paul's, commanding him to swear William Folbigg, one of the churchwardens of the parish of Saint Giles, Cripplegate, London: the defendant returned *non fuit electus*, on which it was contended on behalf of Folbigg, that the return was bad; that the archdeacon, who was only to obey the writ, could not judge of the election,

(a) Rex v. Dr. Harris, 3 Bur. 1420.

(b) Rex v. White, 2 Ld. Raym. 1379.

and that the case of the King and White was a direct authority against the return. "But both my brother Reynolds and myself," says Lord Raymond, "took the return to be good. But upon the importunity of the counsel for Folbigg, and their pressing the authority of the King and White, and no counsel for the defendant appearing, a rule was made *for a peremptory mandamus, nisi*, at which afterwards my brother Reynolds and I were much dissatisfied; but the counsel for the defendant at another day coming to shew cause against the rule, we discharged it. And the court not being unanimous, it was ordered to come on again in the paper. But I never heard it stirred again.—But there can be no doubt but such a return is good" (a).

SOME other cases will be mentioned by and by, in confirmation of Lord Raymond's opinion.—Perhaps the rule may be more satisfactorily expressed in these words.—"That a ministerial officer to whom a mandamus is directed, must not excuse himself from executing the writ, by returning facts collateral to those *suggested* in the writ, or by denying the legal consequence of them; but that he may directly deny their truth."

IN general, when the return to a mandamus is adjudged insufficient, a *peremptory* mandamus issues (b). But if, notwithstanding the insufficiency of the return to a mandamus to be restored, the party applying for it appear to have no right, the court will not grant the peremptory writ.—Therefore, where it was set forth by a mayor's return to a mandamus commanding him to restore a burgess in the corporation, "that the complainant had applied to him to be dismissed from the office of burgess, and that, at the desire and request of the complainant, he, the mayor, had done accordingly: it was objected that this

(a) *Rex v. Harwood*, 2 *Ld. Raym.* 1405.

(b) 1 *Sid.* 286.

return

that this return did not set forth how the corporation commenced, whether by letters patent, or prescription, nor that the mayor, &c. had any power to disfranchise. But the court, on the principle above stated, refused to restore the party (a).

So, where it appeared, that the person applying to be restored, had *deserted* his office, and that it was filled up, though it was returned, that he was for that cause removed by the common council, without stating, that they had a power so to do either by charter or prescription (b).

If a mandamus come so late to the party to whom it is directed, that he has not time to execute it, he may return that as an excuse, and it will be allowed as a good return (c).

The return must give a direct answer to the suggestion of the writ; therefore, where a mandamus was directed to the mayor of Barnstable, commanding him to restore a person to the office of recorder, and he returned *quod non constat nobis*, that he was ever elected, this return was adjudged void, and restitution awarded (d).

It has been generally held, that where a mandamus to *admit*, only suggests that the party was elected, the answer must be, that he was not elected, and not that he was not *duly* elected, because that is not a direct denial of an election in point of fact; but that where the writ suggests, that the party applying to be admitted was *duly* elected, a return that he was *not duly* elected is sufficient, that being a direct answer to the suggestion of the writ (e).

(a) 1 Sid. 14.

(b) Rex v. mayor, &c. of Newcastle, Mich. 21 G. 2, Bul. Ni. Pri. 207. (c) 2 Ld. Raym. 1479, 3 Str. 763. (d) Raym. 153.

(e) Vid. Salk. 434. Carth. 170. 1 Show. 253. 1 Keb. 733. 1 Sid. 209, 210. 7 Mod. 83.

So, where a mandamus commanded to swear A. and B. churchwardens, suggesting, that they were *debito modo electi*, and the return was *quod non fuerunt debito modo electi*, but did not say *nec eorum aliquis*; this was held a good return, because the writ did not command the defendant to swear *one* of them, if *both* were not chosen, and therefore this was an answer to the writ (a).

BUT in a case which occurred the very next year (b) where the writ and the return were in the very same terms as here, the return was quashed: and it was said that the defendant must comply with the writ as far as he could; that if one only was duly chosen, *he* ought to be sworn: that where the parson claimed to choose one, and the parishioners insisted on choosing both, and actually chose two by equal votes, so that the defendant did not know which to swear, he might return the matter specially. At last, by the direction of the court, it was agreed to try the question in a feigned action.

WHERE a mandamus, suggesting that one Matthew Hubbard was, in Easter week, chosen churchwarden of Heston, commanded the defendant to swear him in, or shew cause to the contrary; the defendant returned, that Hubbard was not elected in *Easter week*: it was objected, that this confined the election to a particular time, and was in the nature of a negative pregnant, as he might have been chosen at some *other* time. But the court overruled the objection, as the return followed the suggestion of the writ (c).

To a mandamus commanding a corporation to restore a man to the place of capital burghers, it is not a sufficient

(a) 7 Mod. 83, 2 Salk. 433, 434—Mich. 1 Ann.

(b) Hil. 2 Ann. 6 Mod. 2 Ld. Raym. 1008. 6 Mod. 89. 3 Salk.

38. (c) Rex v. Sir Henry Penrice, 2 Str. 1235.

return of a resignation, that he consented to be turned out; it must be expressly said, that he resigned, and that they accepted his resignation (*a*).

To a mandamus to admit a town clerk, it was returned, that he had not taken the oaths prescribed to be taken by the statute 13 Car. 2, c. 1, *before the mayor*: the return was held defective, because he might have taken them before two justices of peace, who, in default of the mayor, are empowered to tender and administer the oaths (*b*).

A MANDAMUS was directed to the bailiffs of Morpeth, commanding them to restore a person to the office of under-schoolmaster of a grammar school, founded by Edward the sixth: they returned, that he had not taken the *oaths* appointed to be taken by the 1 G. 1, for which reason they could not restore him: this return was held insufficient, because there is an oath (*c*) in that act which he was not bound to take (*d*). They should have said, that he had not taken the oaths of allegiance, abjuration, and supremacy, or the oaths required to be taken by a schoolmaster.

THE return must answer the material part of the writ with such exact certainty, that the court may be able to determine, whether it be a sufficient cause or not for not doing the thing commanded. It is not sufficient that the prosecutor of the writ may be able to falsify the return in an action for a false return.

A MANDAMUS was directed to the mayor, bailiffs, and all the principal burgesses of the town of Abingdon, except R. and S. setting forth the constitution, by which the commonalty were to elect two out of the capital burgesses, of whom the mayor, bailiffs, and capital burgesses

(*a*) Reg. v. Lane, 2 Ld. Raym. 1304.

(*b*) 5 Mod. 318.

(*c*) The Scotch oath.

(*d*) Rex v. Ballivos de Morpeth, 1 Str. 58.

were to elect one to be mayor for the ensuing year, and suggesting, that R. and S. were capital burgessees, and had been chosen by the commonalty ; it, therefore, commanded the defendants to elect one of them accordingly, and the mayor to swear him into the office. They returned the statute 13 Car. 2, st. 2, c. 1, and that within twenty years next after the 25th of March 1663, R. and S. had been elected to the office of capital burgessees, but that within a year before their election, they had not received the sacrament, by reason of which their election was void, and *they were not capital burgessees*. The court held this return uncertain: the writ, they observed, *supposed* the plaintiff's capital burgessees, which was not answered by the special matter of the return ; for though the first election might be void, yet they might afterwards have qualified themselves, and been chosen again, and there was nothing in the return which excluded the intendment of a subsequent election (*a*).

So, where a mandamus commanded the defendants to admit the plaintiff to his freedom ; to which they returned, that there were five court days held yearly, at *particular* times, in the Guildhall, for the admission of freemen, and other purposes, on which days all persons intitled to their freedom, and desiring admission, had been admitted ; that on the 26th of April a court was held, of which notice had been before given to the plaintiff, but that he did not then appear, and therefore, he could not be admitted: this return was held insufficient, because a person qualified had a right to be admitted whenever he demanded it, unless he were confined to particulars days ; and here it was not said, that the five days were the only days on which he could be admitted (*b*).

(*a*) Rex v. mayor of Abingdon, 2 Salk. 432. 1 Ld. Raym. 559.

(*b*) Rex v. Whislin, Andr. 1.

BUT,

BUT, where the writ suggested that the plaintiff was duly elected, sworn and admitted into the office of coroner, without mentioning any time, and commanded the defendants to restore him: to which they returned, that the plaintiff on the 29th of August 16 G. 2, was duly chosen coroner; but that neither at the time of his said election, nor since that time, nor yet was he admitted or sworn into the office, and that, therefore, they could not restore him: this return was held good, and the admission of the party sufficiently denied; for that though the words "nor since that time" comprehended only the intermediate time between the election and *teste* of the writ, and consequently would not alone have been sufficient, yet the subsequent words, "nor is he yet admitted," denied his admission at any time whatever. It was added, that in the case of Abingdon, had the return further alleged, that the party had not yet received the sacrament, it would have been good (a).

To a mandamus to proceed to an election, it is a good return, that before the coming of the writ an election had been regularly had.

ON a suggestion, that no portreeve was elected for the borough of St. Michael's on the charter day, a mandamus was awarded, directed to the steward of a court leet, in the borough, by which he was commanded to hold a court leet, and impanel and swear a jury; and to charge the jury to elect and swear some person into the office of portreeve of the said borough: the steward, in his return, stated, "that in obedience to the command of the writ, he had holden a court leet, and impanelled and sworn a jury; and had charged the jury to elect and swear some person into the office of por-

(a) Rex v. mayor, &c. of Lynn, Ard. 105.

treeve of the borough: and that it was found by the jury, that J. S. was duly elected and sworn into the office of portreeve of the borough on the charter day; and that, therefore, no person could be elected and sworn into the office of portreeve of the borough as by the writ was commanded.

It was objected to this return, that it was argumentative, and not positive. But the court was of opinion, that it was sufficiently positive, as to the principal fact, "that a person was duly elected and sworn into the office of portreeve of the borough on the charter day." If this was true, there ought not to be any election; if it was not true, an action might be brought for a false return (a).

BUT, to a mandamus to admit, it is not a good return, that before the coming or issuing of the writ, another person was chosen and admitted into the office.

A MANDAMUS was directed to Charles Luxon, mayor of the borough of Boffiney or Tintagel, in Cornwall, to swear Ambrosius Manaton into the office of mayor, to which he had been elected: Luxon returned, that before the issuing of the writ, specifying the day, he the said Charles was removed from the place of mayor, and one William Amy, then chosen, admitted and sworn, and from that time *hucusque fuit et adhuc est major burgi prædicti*, and by reason of his said office had the custody of the common seal, for which reason the said Charles could not swear Manaton as the writ required.—Two justices, Dolben and Raymond, thought the return insufficient, because it did not say, that the new mayor, Amy, was *duly* elected, and it might have happened, that he was chosen out of time, and not according to the charter: But Scroggs, C. J. and Jones, J. thought that the suggestion that Amy

(a) Rex v. Williams, Sayer. 140

was chosen, necessarily implied, that he was *duly* elected; and that if an action were brought for a false return, and on an issue of elected or not elected, it should appear, that he was not *duly* elected, the plaintiff would recover. But as the court was equally divided, a peremptory mandamus was not awarded (*a*).

BUT afterwards, in the case of the borough of Saltaſh, a return exactly ſimilar being made to a ſimilar mandamus, the whole court thought it inſufficient, becauſe it did not answer the giſt of the writ: for, by ſuch a return, any officer might be kept out of office, as the perſon whoſe buſineſs it was to return the writ, might procure another to be choſen before the party intitled to be admitted could procure a writ; and, therefore, the defendant ought to have returned, that the party proſecuting the mandamus, had never been elected, who might then have had an action for a falſe return. On theſe principles the court awarded a peremptory mandamus to ſwear in, and admit the complainant (*b*).

IF the ſuggeſtion of the writ be falſe, in not truly ſtating the conſtitution of the corporation, it is not ſufficient, that the return ſtate the conſtitution as it really is: it muſt poſitively deny, that it is as ſuggeſted in the writ. Therefore, where a mandamus directed to the bailiffs and burgeſſes of Malden, reciting, “that they ought to chooſe yearly two bailiffs, out of ſuch as had not been bailiffs for three years,” commanded them to proceed to an election: and they returned, that their conſtitution, by letters patent, was, that they ſhould chooſe *ex aldermannis*, and that they had choſen two, *ſecundum formam, et effectum literarum pa-*

(*a*) Raym. 365:

(*b*) Raym. 431, 432, Sir T. Jones 177.

sentium generally ; this was held insufficient, because it did not deny the constitution stated in the writ (a).

It has been seen (b), that a corporation may possess a power to remove at pleasure : as a consequence from thence, it follows, that in a return to a mandamus to restore, they may allege this power, and that they have exercised it : but they must allege it in direct terms, and not by way of recital in a charter. They must likewise rely on it as the only reason of their having removed the party, and not state *particular* reasons : for if these be insufficient, the court will award a peremptory mandamus (c).

BUT after having restored the party in obedience to the writ, they may immediately remove him without assigning any other reason than their own will.—So, where they have removed a person for sufficient reasons, but a peremptory mandamus has been awarded on account of the insufficient manner in which these reasons have been expressed in the return, they may immediately after his restoration remove him for the same reasons as before (d).

To a mandamus to restore a jurat of Maidstone to his place, it was returned, that by their incorporation they had power to elect jurats for life, if it should seem expedient : that they had elected the party applying to be restored, and that afterwards it seemed expedient to them to turn him out, which they had accordingly done. This was held insufficient, because, though they had a power to elect for life, if it seemed expedient, it did not follow, that if they did actually elect for life, they had a power to remove whenever they pleased (e).

(a) 2 Salk. 1 Ld. Raym. 481.

(b) Vid. 1 Ld. Raym. 710, ante, p. 58, 59.

(c) Salk. 429, 435, 2 Ld. Raym. 1240. (d) 2 Ld. Raym. 1283.

(e) 1 Lev. 148.

THE return must answer the suggestion of the writ, not in words only, but in substance; for if it be true in words only, and not in substance, an action will lie for a false return (*a*).

A MANDAMUS directed to the mayor and burgeses of Lyme Regis, reciting, that David Robert Mitchell had been *duly* elected, admitted, and sworn a capital burges of the borough, and that they had removed him without any just or reasonable cause, commanded them to restore him, or shew cause to the contrary: to this they returned, that Mitchell was not *duly* elected, admitted, *and* sworn, a capital burges of the said borough, and therefore they could not restore him, or cause him to be restored.

LORD MANSFIELD, when the case was first argued, said, it appeared to him to be sufficient if the suggestion of the writ was fully denied, whatever that was: that he was not thoroughly satisfied of the sense and meaning of the distinction between "elected" and "duly elected:" it seemed to be a contradiction to say, that a man had been elected, and at the same time to say, that he had not been *duly* elected: they seemed to him to be the same: on an issue to try if a man had been elected, he must prove a *due* election. In general, indeed, where a person took upon himself to suggest what he was not bound to do, that might be denied: but another thing struck him at present; the return should be such as, if true, would shew, that the party had no *right* to be restored, and therefore it ought to deny the material part. In the case of Lynn (*b*), where the arguments had been very nice on this head, it was denied, that there was *any* admission. Here, they denied, that Mitchell was duly elected, admitted, *and* sworn, in the conjunctive: on such an issue he must prove all the

(*a*) Brathwate's case, 1 Ventr. 19.

(*b*) Ante, p. 381.

three allegations; yet the dueness of his election was immaterial, because the corporation could not judge of the title.

ON a subsequent day his Lordship delivered the opinion of the court to this effect. That the grievance complained of, by the person applying for the writ, was, that having been duly elected, admitted, and sworn, he has been removed by the corporation; and *they* were to shew a just cause of removal. It was admitted, that they could not remove for want of original title, but it was contended, that they had sufficiently answered the suggestion of the writ, and that issue might be taken, or an action brought on the return: on full consideration, the court were all of opinion, that the return must answer not the words, but the materiality of the writ, and nothing shewed this more than the nicety in the cases as to *elected* and *duly elected*. A return which seemed to be guarded, and not to deny the substance, was bad, although he rather thought that nothing was an election but a due election. Here the material suggestion was the removal. They were not to judge of the title. The return was in the conjunctive, "not duly elected, admitted, *and* sworn," and therefore fallacious. If the truth would have warranted it, and they had returned not duly elected, *or* admitted, *or* sworn, it might have been good.—The court were all of opinion, that the return was insufficient, and therefore a peremptory mandamus must issue (*a*).

WHERE to a mandamus to restore, it is returned, that the party complaining was removed by the corporation at large, it is unnecessary to state, that the corporation has the power of amotion, because it is incidental to them, un-

(*a*). *Rex v. mayor, &c. of Lyme Regis*, Doug. 79.

less it be vested by charter, bye law, or prescription, in a select body (a).

BUT where he is stated to have been removed by a select body, the return must shew by what title it possesses that authority (b).

IN every case of amotion the return must shew precisely the *cause* and the proceedings, that the court may judge of the legality of the one, and the regularity of the other (c).

THE cause must not be too *generally* alleged: as that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without saying what these rules and orders were (d).

So, a removal for neglect of duty is bad, without stating the particular instances, that the court may judge of their sufficiency (e).

BUT when it is part of the return, that the party applying to be restored to his freedom, had broken his oath as a freeman, it is not necessary to set forth the whole of the oath: it is sufficient to set forth so much of it, as to shew, that he has broken the oath (f).

THE causes of amotion, and the regularity of the proceedings in removing, have been fully considered in former parts of this work (g).

THE return to a mandamus may contain several independent matters, provided they be consistent (h).

THUS where a mandamus commanded the defendant to admit and swear Joseph Wright a freeman of Morpeth: and the return alleged, First, That he was not duly elect-

(a) Doug. 144 (149). Ante, p. 56.

(b) Id. *ibid.*

(c) 2 Bur. 731.

(d) 2 Ld. Raym. 1564.

(e) Rex v. mayor, &c. of Doncaster, Sayer 39.

(f) Vid. Style 478, 479.

(g) Vol. 1, 430. Vol. 2, 62, &c.

(h) 2 Salk. 436, 2 Ld. Raym. 1244.

ed; and secondly, That by the custom of the borough, no person could be admitted, as a freeman, unless he had been first approved by the lord of the manor; and that the plaintiff had not been so approved: It was objected, that this return was double, and therefore, according to a rule of pleading, was improper: but the court held, that was no objection, and that the defendant might return any number of consistent causes (*a*).

To a mandamus to restore a person to the office of sexton, it was returned, First, That he was not duly elected: and secondly, That there was a custom in the inhabitants to remove at pleasure, and that they had so removed him pursuant to the custom: it was objected, that the causes were inconsistent: that he was not duly elected, and that he was regularly removed: but the court held the causes to be consistent; because, as he was in possession in point of fact, they might justify the removal, either on the ground that he was not duly elected, or if he was so, that they had a right to remove him at their pleasure (*b*).

BUT still the causes, must be consistent; and if they be not, the whole return is bad (*c*), because the court cannot judge which of them is true, and which of them is false.

To a mandamus directed to the mayor and aldermen of Norwich, commanding them to admit one Dunch to the place of an alderman: they returned, that by a charter of Edward the fourth, the aldermen were to be chosen and presented in the same manner as in London; that in London, if a person was elected alderman of a ward, the court of aldermen might refuse him: that Dunch *was elected* by

(*a*) Wright v. Fawcett, 4 Bur. 2041.

(*b*) Rex v. churchwardens of Taunton St. James, Cowp. 413.

(*c*) Vid. Rex v. mayor of Cambridge, 2 Term Rep. 456. Rex v. mayor of York, 5 Term Rep. 66.

the ward, but refused by the mayor and aldermen, because he had not received the sacrament within a year next before his election; that he was turbulent and factious, and procured his election by bribery: and that he was not elected. The court held the return repugnant; because at first it admitted an election and avoided it, and at last asserted that there was no election at all; and therefore a peremptory mandamus was awarded (*a*).

BUT if the return consist of several independent matters consistent with one another, and some of them be good in law and some of them bad, the court may quash the return as to the latter, and put the prosecutor to traverse or plead as to the former (*b*).

THUS, where a mandamus was directed to the mayor and commonalty of Cambridge, commanding them to admit Patrick Beales into the office of common councilman; and they returned, that from time immemorial, such person had been accustomed to be admitted to the freedom of the borough as paid such sum of money as the mayor, bailiffs, and burgeses, or the major part of them, had agreed and fixed on in common hall, and on payment of such sum, and being sworn into the office of burgeses, had been intitled to *all* the privileges, rights and profits belonging to that office, that by immemorial custom within the borough, no person was eligible to the office of common councilman who had not either actually served the offices of treasurer and bailiff, or paid such sum to be excused from serving such offices, as had been fixed by the mayor, bailiffs, and burgeses, or the major part of them, in common hall, on the application of the burgeses desiring to be excused from serving such offices: that on the 11th day of January, 1785, it was

(*a*) Reg. v. mayor, &c. of Norwich, 2 Salk. 436. 2 Ld. Raym. 1244.

(*b*)

agreed, that Beales might be admitted to the freedom of the borough on payment of the sum of thirty guineas, and that on the same day the mayor, bailiffs, and burgeses, believing that he had paid that sum to the treasurer, directed, that he should be sworn into the office of burges: that afterwards, on the 12th of April, 1785, it was agreed, that Beales should be excused from serving the offices of treasurer and bailiff on the payment of ten guineas; but that, in fact, he had never paid either the sum of thirty guineas or ten guineas: that on the 16th of August, 1787, being a grand common day, holden in and for the said borough, a certain bye law, or order, was propounded in the following words, "ordered by the mayor, bailiffs, and burgeses in common hall assembled, that no person shall be eligible to the office of common councilman, but such as have served the offices of treasurer and bailiff; and that no person having been dispensed from serving such offices of treasurer and bailiff shall be eligible into the office of common councilman, until he has actually served such offices, any usage, bye law, or ordinance to the contrary notwithstanding:" that this bye law on the 24th of the same month, being a grand common day, was confirmed by the mayor, bailiffs, and burgeses, then and there assembled in common hall: that by reason of the premises, the said Patrick Beale was and continued to be ineligible to the place and office of one of the common councilmen of the said borough: and further, that the said Patrick Beales was *not duly elected* into the said place and office of one of the common councilmen of the said borough, as by the writ was supposed—and for these reasons they could not admit him.

To this return it was objected: First, That none of the material facts were positively alleged, but that the whole
must

must be understood only by way of intendment, and therefore the court could take no notice of them in the manner in which they were stated; but, secondly, Supposing the court *could* take notice of them, then the return was bad, because it stated, by way of inference, two inconsistent facts: for, first, it professed to shew that Beales was *not* a burghess; and then that he *was* a burghess, but that he was not qualified to be elected a common councilman, because he had not served certain offices, which no person but a burghess could serve. These, it was contended, were the only two causes, which were intended to be expressly returned as such; for, as to the allegation at the conclusion of the return, that Beales was *not duly elected*, that was not intended as a distinct allegation, but as a conclusion and inference from all the facts stated, which it was the province of the court to draw. That he was *not duly elected*, was meant as a conclusion from his *not being eligible*.

To this it was answered, that the latter part of the return, "that Beales was not duly elected," was, independent of the rest, a good return to the mandamus: that there were no words of reference, such as "therefore", or "for the reasons aforesaid," which would, it was confessed, have connected this with what went before, and reduced it to a mere inference from the facts stated: but as it stood now, it was a distinct return of itself.

THE court observed, that as they might undoubtedly quash the *whole* return, so they might quash a part of it if they thought proper, and retain the rest: that where two *inconsistent* causes were returned, the court must, indeed, quash the whole, because they could not tell which to believe: but it did not appear that the causes here were inconsistent. The first stated, that he was not a burghess; the second, that granting him to be a burghess, he was *not*

eligible to the office of common councilman: the third, that if eligible, he was not duly elected.—They therefore quashed the return as to the two first, and allowed it as to the last, “that he was not duly elected” (*a*).

RETURNS to writs of mandamus must be as certain since the st. of Anne as before; for that act does not excuse the necessity of precision in the return; though it enables the prosecutor to traverse the material facts alleged in it (*b*).

IF a clerk of the peace be removed by the justices, and apply for a mandamus commanding them to restore him, and they return a judgment given by them for his removal, on a complaint made of offences committed by him: the court will not grant a peremptory mandamus, though the offences be not alleged with certainty, because the order of the justices is a judgment till set aside: the proper way is, to have the order removed by certiorari, and on the return to that writ to take exception to it, and if it be quashed, then to apply for a mandamus (*c*).

AFTER a peremptory mandamus to swear in an officer, no subsequent examination shall be admitted by summary application to inquire whether he was lawfully elected, though that application come from the attorney-general.—Therefore, where a mandamus was directed to the jurats of Rye, commanding them to swear in Turner mayor of the town, and the minority, with design, made an insufficient return, on which a peremptory mandamus issued, and Turner was sworn in: the court refused an application afterwards made by the attorney-general for a mandamus to swear in one Crouch, who had been elected mayor, ob-

(*a*) *Rex v. mayor, &c. of Cambridge*, 2 Term Rep. 456.

(*b*) *Vid.* 2 Bur. 729, 733, 735, 741, 744. Doug. 181, (173), 182, (174).

(*c*) *Baine's case*, 2 Ld. Raym. 1268.

serving, that it was not now their business to decide between the claimants, till the matter should be regularly tried.— In this case the parties consented to try the question in a feigned issue (a).

THE statute of Queen Anne gives costs to the party prosecuting a mandamus, only in the case where a return is made, and proceedings had, and judgment given in his favour.— But it makes no provision for costs in case the writ is obeyed, though the party prosecuting it may have been put to considerable expence. To remedy this grievance in the case of persons intitled to be admitted to the *freedom* of corporations, it is enacted by the st. 12 G. 3, c. 21, “that where any person shall be intitled to be admitted a citizen, burghess, or freeman of any city, town corporate, borough, cinque port or place, and shall apply to the mayor, or other person, officer or officers in such city, &c. who hath or have authority to admit citizens, burghesses, and freemen, desiring to be admitted a citizen, burghess, or freeman; and shall give notice, specifying the nature of his claim, to such mayor or other officer or officers, that if he or they shall not so admit such person a citizen, burghess, or freeman, within one month from the time of such notice, an application will be made to the court of King’s Bench for a writ of mandamus to compel such admission; and if such mayor or other officer or officers shall, after such notice, refuse or neglect to admit such person, and a writ of mandamus shall afterwards issue to compel such mayor or other officer or officers to make such admission, and in obedience to such writ, such person shall be admitted by the said mayor, or other officer or officers, a citizen, burghess, or freeman of such city, town corporate, borough, cinque port or place, then such per-

(a) Sir T. Jones, 215.

son shall, unless the court shall see just cause to the contrary, obtain and receive from the said mayor, or other officer or officers so neglecting or refusing, all the costs to which he shall have been put in applying for, obtaining, and serving such writ of mandamus, and enforcing the same, by a rule to be made by the court out of which such writ shall issue, for the payment thereof, together with the costs of applying for, obtaining, serving, and enforcing the said rule; and if the rule so to be made shall not be obeyed, then the same shall be enforced in such manner as other rules made by the said court (a).

(a) Note: By the same statute it is enacted, that, in order that it may be known what persons are from time to time admitted freemen or burgesses of any city, &c. the mayor, bailiff, town clerk, or other officer of any city, &c. having the custody of, or power over the records of the same, shall, upon demand of any two freemen or burgesses, permit such freemen or burgesses, and their agent or agents, at any time between the hours of nine in the morning and three in the afternoon, to inspect the entries of admission of freemen, burgesses, or other inferior corporators, and to take copy or extracts therefrom, paying for every such inspection 2s. 6d. and for every such copy or extract, not exceeding seventy-two words, the sum of 4d. and so in proportion for all such copies or extracts: and if any mayor, bailiff, town clerk, or other officer shall refuse or deny the inspection of any such entries, or to give copies or extracts as before directed; he or they shall, for every such denial or refusal, forfeit the sum of 100l. to any person who shall sue for the same; to be recovered, with full costs of suit, by action of debt in any of his Majesty's courts of record at Westminster, in which action, it shall be sufficient for the plaintiff to allege in his declaration, that the defendant or the defendants is or are indebted to the said plaintiff in the sum of 100l. for money had and received to his use; provided that such action shall be commenced within the space of one year after the cause of it shall have arisen, and not afterwards.

SECTION III.

Of Informations in the nature of Quo Warranto.

By the fiction of the feudal law, the King, as the head and visible representative of the community, was considered not only as the ultimate proprietor of all the land in the kingdom, but the fountain from whence all public franchises were derived; and if any individual or collective body of men, whether corporate or not, without legal authority, exercised any such franchise, it was considered as an usurpation on the King's prerogative: if a franchise had been legally granted, but was exercised in a manner inconsistent with the express or implied condition of the grant, the latter was considered as forfeited, and the King might resume it.

THE manner by which either the original title to franchises was tried, or the forfeiture of them for subsequent misapplication was enforced, was by writ of QUO WARRANTO, which was called the King's writ of right for franchises and liberties: and in analogy to other writs of right, the judgment was final for the point adjudged, whether against the King or against the defendant (*a*).

THIS was an original writ issuing out of Chancery, directed to the sheriff of the county, commanding him to summon the defendant to be at such a place before the King at his next coming into the county, or before the justices itinerant at the next assize, "when they should come into those parts," to shew by what warrant, "quo warranto," he claimed the franchises mentioned in the writ (*b*).

(*a*) 2 Inst. 282. 1 Bulstr. 55, 56.

(*b*) St. quo warranto, 6 Ed. 1, f. 5. By being before the King, was meant, being before the King's Bench.

By the authority of this writ the sheriff was to summon the defendant forty days before the time appointed for the coming of the King's Bench, or of the Justices in Eyre, into the county, to appear before them respectively at the day, to shew by what authority he claimed to exercise the franchises mentioned in the summons. If he did not appear at the day, judgment was given, that the franchises should be seised into the King's hands, in the name of a distress, which the defendant might at any time during the sitting of the King's Bench, or of the Eyre, come in and replevy, and then plead, as if he had appeared at the first day. The consequence of his not coming to replevy them during the sitting, will be considered hereafter (*a*).

THE statute of Gloucester (*b*) so far altered this process, that if the defendant did not appear on the first day, a *venire facias* issued to the sheriff, commanding him to summon the defendant to appear on the fourth day, on which, if he did not appear, judgment of seisure was given, as before this statute on his non-appearance on the first day (*c*).

IF the defendant appeared on the return of the *summons* or of the *venire*, a day was given him to plead, or he might plead on his appearance, and if his plea was insufficient, still a day was given him; on which, if he made default, judgment of seisure was given as in the case of his non-appearance on the first day: but there was this difference between the effect of the judgment in these two cases, that when it was given for non-appearance, he might, within the sitting of the King's Bench, or of the Eyre, replevy the franchises as a matter of course, without paying any

(*a*) Vid. 2 Inst. 282. Keilw. 139, pl. 5.

(*b*) Quo war. 6 Ed. 1, f. 5.

(*c*) Vid. Jenk. 141. 2 Rol. Rep. 46, 92.

fine; but when it was given for his default on the day given him to plead, the court might impose a fine upon him, before he was permitted to replevy (*a*).

THIS was the ordinary course of proceeding at common law before the justices in Eyre, and the court of King's Bench, when it accompanied the King in his progress through the different counties; but a more summary mode was adopted by Edward the first, in the beginning of his reign. As he wanted money, it was suggested by some of his counsellors, that few of the nobility, clergy, or commonalty who had franchises by the grant of his progenitors, could produce the charters in support of the claim, as most of these had, by length of time, or from the tumult and confusion of the civil wars in the time of Henry the third, or by accident, been either lost or destroyed: in consequence of this council, the King issued a proclamation, commanding every man who had liberties or franchises to appear before certain persons commissioned for that purpose, to shew by what title he claimed them; on which many franchises which had long been quietly enjoyed, were taken into the King's hands "*eo quod nullâ tabulâ constarent*."—This produced much discontent throughout the kingdom; and therefore the King, who well understood how to prevent the ill consequences of an obnoxious measure, gave his approbation to the statute of Gloucester (*b*).

By that statute it was enacted, that a writ, in general terms, should issue to the sheriff of every county, commanding him to permit all persons within his county to continue in the enjoyment of such liberties as they had

(*a*) Vid. Maynard's Ed. 2, 530. Keil. 137 b. pl. 1. 9 Co. 28 b. 29 a.

(*b*) 6 Ed. 1, vid. 2 Inst. 280.

hitherto reasonably used till the coming of the King into that county, or till the coming of the justices in Eyre, or till the King should give some further direction on the subject (a).

BUT at the same time the form of another writ was prescribed, by which the sheriff was commanded to make public proclamation throughout his county, as well in cities as in boroughs, and other trading towns, and elsewhere, that *all* those who claimed to have any liberties by charter, or otherwise, should appear before the justices at the first assize, when they should come into those parts, to shew by what authority they claimed to have them (b).

THIS proclamation was to be made forty days before the coming of the justices, in analogy to the summons on the common writ; but every individual, who claimed any franchise, was, without any specific complaint made against him, at his own peril, without a *particular* summons, to come and shew *what franchises* he claimed, and by *what warrant*. If he did not come in at the day, his franchises were to be taken into the King's hands in the name of a distress, by the sheriff of the county, so that he should not use them till he came to answer before the justices: when he came he might replevy them; but he was then to answer immediately according to the form of the general writ. If he objected, that he was not bound to answer without an original writ prosecuted individually against himself, inquiry was to be made, whether he had usurped or occupied any liberties on the King or his predecessors, "of his own head or presumption," or whether his ancestors had died seised of them? if, "by any mean," the former appeared to be the case, he was to answer immediately

(a) Quo. war. 6 Ed. 1, f. 2.

(b) Id. f. 4.

without

without writ; if the latter, then he was to be indulged with an original writ out of chancery, the form of which is given in the statute, and seems to be the same as that at common law (*a*). The process given to compel an answer has been already described (*b*).

THE defendant to a particular writ might either disclaim or plead; if he pleaded, it was incumbent on him to shew a complete title against the King (*c*), in which respect there is a remarkable difference between this proceeding, and a civil action: in the latter, the *plaintiff* must recover by the strength of his own case, and must not rest on the weakness of the *defendant's* plea; for however defective the latter may be, yet if the plaintiff do not shew a cause of action, he cannot recover: but as all franchises are derived from the crown, the writ of QUO WARRANTO shews no title in the King to have the particular franchise exercised by the defendant, but calls upon the latter to shew by what title he claims it, and if the title he sets forth be incomplete, the King is intitled to judgment (*d*).

To the plea there might either be a demurrer or rejoinder on behalf of the King, and subsequent pleadings as in other cases (*e*).

It frequently happened, that though the defendant shewed a good title, by a charter from the King, the justices delayed to give judgment in his favour under pretence of their not being certified of the King's pleasure: in this case the defendant was under the necessity of suing out of chancery a writ *de libertatibus allocandis*, which, after reciting the defendant's title, commanded the justices to allow it (*f*).

(*a*) Id. f. 5.

(*b*) Ante, p. 396.

(*c*) 9 Co. 28 a.

(*d*) Vid. 4 Bur. 2146, 7.

(*e*) Vid. the st. quo war. f. 5.

(*f*) Reg. 162, F. N. B. 229, 2 Inst. 495.

BUT as this writ lay only where the defendant shewed a charter, he was without remedy where he claimed by prescription. This being the subject of much complaint, contributed to produce the statute *de quo warranto novum* in the eighteenth year of Edward the first, by which it was enacted, that "all under the King's allegiance, who could verify, by good inquest of the country, or otherwise, that they and their ancestors, or predecessors, had used any manner of liberties of which they were impleaded by writs of QUO WARRANTO, *before* the time of King Richard, or in *all* his time, and had continued hitherto, so that they had not misused such liberties, should be adjourned further to a certain day reasonable before the same justices, within which they might go to the King with the record of the justices signed with their seal, and the King should, by his letters patent, confirm their estate (a).

It seems, that before this statute, writs of quo warranto had been frequently made returnable in the courts at Westminster, and that where they were made returnable in the eyre, the justices frequently adjourned the question to those courts (b). Both these practices were productive of great oppression and expence to the defendants, and were, therefore, frequently the subject of complaint. The King, therefore, by this statute, granted, "that, for sparing the costs and expences of the people of his realm, pleas of quo warranto from thenceforth should be pleaded and determined in the circuit of the justices, and that all pleas then depending should be adjourned into their own shires, until the coming of the justices into those parts" (c).

WHEN

(a) 18 Ed. 1 ft. 2. (b) Vid. Maynard's Ed. 2, 530. 2 Inst. 497.

(c) S. 2. Lord Coke, in his 2 Inst. 497, says, "of this branch we find a notable case in our books. The archbishop of York was in possession

WHEN the justices in Eyre ceased, "then," says Lord Coke, "this branch of this statute for the ease of the subject, and for saving their costs, charges, and expences, lost its effect; for with justices in Eyre this branch lived, and with them it died" (a). So, that what writs of quo

possession of prisage of wines in the port of Hull, and in the reign of Edward 2, in the time of *John* archbishop, the same franchise was seized into the King's hands; after the decease of John, William his successor sued in parliament in the reign of Ed. 3, by petition of right, to be restored to the said franchise; and afterwards by parliament the petitioner was restored to the possession of the franchise, and by the same award it was adjudged, that the said William, the petitioner, should answer the King *when and where* he pleased; and the like award was made on the petition of the said William in the parliament the morrow after the feast of St. Katherine, in the fourth year of the said King; whereupon the King brought a writ of quo warranto against the said William, archbishop, returnable in the court of *common pleas*, to know by what warrant he claimed to have prisage of wines in the port of Hull; Parning, that famous serjeant, (who after was Chief Justice, and after that Lord Treasurer of England, and lastly, Lord Chancellor of England) of council with the archbishop, pleaded to the jurisdiction of the court, and demanded judgment, if the archbishop ought to make any answer there, for that King Edward, grandfather of Ed. 3, made a statute (intending this statute of 18 E. 1) which provided that pleas of quo warranto should be pleaded before justices in Eyre in the counties, and that it was ordained by a statute made in the time of King Ed. 3, at his parliament at Northampton, that by a writ under the great, or privy seal, no disturbance should be that common right should not be done to all, and we intend not, faith he, that against the said statute, which is a law common to all, that we ought to answer in this court. The matter concerning this act of 18 Ed. 1, was not denied, but Sir William Herle, C. J. who gave the rule, replied, upon the award of parliament, that the archbishop should answer the King, when and where he would, and thereupon Parning answered over."

(a) 2 Inst. 498.

warranto were afterwards prosecuted, were necessarily made returnable in the courts of Westminster, and most commonly in the King's Bench: the process was the same as on writs returnable before the justices of Eyre; and if the defendant did not come in within the *term* in which the *venire* was returnable, and replevy his franchises, the consequence was the same as in the case of his not replevying them during the sitting of the Eyre (*a*).

AFTER plea pleaded, the defendant, it is said, might have amended his plea, paying costs, before demurrer joined; and the reason given is, that the party is for ever concluded by the judgment: but, after demurrer joined, it is said, it seems, that he could not amend (*b*).

WHERE a person came before the justices in Eyre, in consequence of the general proclamation, without an original writ, the entry on the record, after the general title of "PLACITA DE QUO WARRANTO," was simply, "such a one gives to the Lord the King so much for licence to claim and have the liberties undermentioned:" then setting out the liberties, and the title by which he claimed them, it concluded with "and by that warrant he claims, &c." (*c*).

WHEN the party came in consequence of a particular writ, the entry, after the general title, was, that such an one was summoned to answer to the Lord the King by what warrant he claims to have such and such franchises (*d*). If the party appeared and pleaded, then the entry was, "and the aforesaid ——— comes, and as to ——— says," &c. setting forth his title or disclaiming.

(*a*) 2 Inst. 283.

(*b*) 1 Sid. 54.

(*c*) Raft. 540 b.

(*d*) Raft. 540 b. Madox 130, 285, 6. Madox, 130, adds, "without the leave of the King or his progenitors," which seems superfluous, and is not in the writ of quo warranto in ft. 6 Ed. 1.

IN both cases, of a claim in consequence of the general proclamation, and of an appearance to the original writ, if the attorney general thought the title of the defendant sufficient, he prayed, that it might be inquired by the country, in what manner the defendant and his ancestors had used the franchises; on which a "fiat inde jurata" was entered; a jury of inquest appeared on the day appointed; and according to their verdict judgment was given for the defendant or for the crown (*a*).

THE form of the judgment will be the subject of future consideration.

AFTER the circuits of the justices itinerant ceased, this writ of QUO WARRANTO gradually went out of use, and an INFORMATION in the *nature* of QUO WARRANTO, at the suit of the attorney general, was substituted in its place (*b*).

THE form of this information is thus: "Such an one, attorney general of the Lord the King, who sues for the Lord the King in this behalf, comes here into the court of our said Lord the King, before the King himself, at Westminster, on _____ in this same term, and for the said Lord the King gives the court here to understand and be informed, that _____ for the space of _____ now last past and more, have used, and still do use, without any warrant or royal grant, the following liberties and franchises, to wit, _____, of all which liberties, privileges, and franchises aforesaid, the said _____, during all the time aforesaid, have usurped, and still do usurp upon the said Lord the King, to the great damage and prejudice of his royal prerogative, whereupon the said attorney of the said Lord the King, for the said Lord the King, prays the advice of the court in the premises, and due process of law

(*a*) Vid. Raft. 540 b.

(*b*) Vid. 3 Bur. 187.

against the said ——— in this behalf to be made, to answer to the said Lord the King, by what warrant he claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid.”

THIS is the form, whether the information be brought for an usurpation without any original title, or for a subsequent forfeiture, where the original title is not disputed (*a*).

THE process usually awarded on the roll against individuals, whether claiming to act as a corporation, or claiming any other franchise, is a *venire facias*, sometimes with a clause of non omittas, and sometimes without. ———

The entry immediately after the conclusion of the information, is thus: “whereupon the sheriff is commanded, that he cause to come;” or, “that he omit not, &c. but that he cause to come, &c. to answer, &c.”

If the defendants do not appear at the day, the next process awarded is a *distringas* (*b*). Against a corporation, not prosecuted for acting as a corporation, but for usurping other liberties, the first process awarded is a *distringas*, and the entry on the roll, in this form: “whereupon it is agreed, that the aforesaid mayor and commonalty, and citizens of ——— be distrained by all their lands, &c. so that, &c. to answer to our Lord the King in the premises, and the sheriff is commanded, that he distrain them in form aforesaid, so that, &c. at such a day” (*c*). ———

WHETHER, if the defendants do not appear, the proper course be to seize the liberties into the King’s hands, as in

(*a*) Vid. Co. Ent. 527—564, per tot. quo war. v. mayor, &c. of London.

(*b*) Vid. quo. war. v. city of London, 2 Co. Ent. quo war. per tot.

(*c*) Vid. Co. Ent. 536 a.

the WRIT of quo warranto, will be examined on a future occasion.

THOUGH a *venire facias* and *distringas* are the process usually awarded on the roll, yet it seems that against *individuals* who cannot be personally served with the *venire*, process of outlawry lies (a).

WHEN the defendant appears, he may either disclaim as to all, or plead as to all the franchises mentioned in the information; or he may plead as to part, and disclaim as to part.

IF he disclaim as to all, the entry is in this form: "the said ———, protesting that the information aforesaid is not sufficient in law, and that he is not under any necessity by the law of the land to answer thereto, for plea nevertheless, saith, that he never used the aforesaid liberties, privileges, and franchises, nor any of them, nor in the same, or any of them, ever usurped upon the said Lord the King, in manner and form as by the said information is supposed, but in the same, and in every of them, disclaims and disavows, whereupon he prays judgment, and that he may be dismissed by the court" (b).

IF he plead as to part, and disclaim as to part, the entry of the disclaimer, after the plea, is in this form: "and as to the residue of the liberties, privileges, and franchises in the said information above specified, upon the said Lord the King supposed to be usurped by the said ———, the said ——— says, that he never used, nor does he now use the residue, &c." (c).

WHERE the defendant pleads, the entry is in this form: "the said ———, as to the aforesaid liberty, &c. of ———,

(a) Vid. Patrick's case, Cro. Jac. 528. Garrard v. Reg. id. 531, both of which seem to have been informations in the nature of quo war.

(b) Co. Ent. 527 b.

(c) Id. 529 b.

says ———." Here he sets out his title to the particular franchise; and so of every other claimed by a distinct title, and concludes his plea as to each, in this manner: "and by this warrant the said ——— has used during all the time aforesaid, in the said information mentioned, and still uses the liberties, privileges, and franchises of ——— as he well might and still may: without this that the said ——— has usurped, or now does usurp the said liberties, &c. on the said Lord the King, in manner and form as by the information aforesaid, for the said Lord the King, is above supposed: all which the said ——— is ready to verify, as the court, &c. whereupon he prays judgment, and that all and singular the liberties, &c. above by him as aforesaid claimed, may be allowed and adjudged to him, and that he may thereupon be dismissed from this court" (a).

THE attorney general then demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.

THE judgment seems to be the same, and subject to the same varieties as on the writ of QUO WARRANTO.

IF it be given in favour of the defendant, the entry is in this form: "it is considered, that the liberties, &c. be allowed to the said ———;" or thus: "the said ——— may use, have, and enjoy, all the said, &c. and that the said ——— as to the said premises may be dismissed from this court, SAVING always the right of the said Lord the King, if hereafter, &c." (b).

"THIS *salvo jure* for the King," says Lord Coke, "serveth for any other title than that which was adjudged; and therefore William de Penrugge, the King's attorney, for prosecuting a QUO WARRANTO against the

(a) Co. Ent. quo war. per tot.

(b) Id. 535 b. 537 a. Raf. 540 b.

abbot of Fischamp for franchises within the manor of Steyning, *sine præcepto*, was committed to gaol" (a).

ON disclaimer, by the defendant, the attorney general prays, "that whereas the said ———, by his plea, has disavowed and disclaimed all and singular the liberties, &c. above specified, judgment may be given for the King, and that the said ———, with the said liberties and franchises, or any of them, may no way intermeddle, but may hereafter be altogether excluded from the same;" and judgment is accordingly given in that form (b).

WITH respect to the form of the judgment for the King, when it is given on the defendant's pleading, there has been much difficulty and dispute (c).

IN the year book of the 15 Ed. 4 (d), this rule is laid down, "that where it clearly appears to the court, that a liberty is usurped by wrong, and exercised on no title, either by the King's grant or otherwise, judgment only of ouster shall be entered: but that where it appears, that the King or his ancestors have once granted a liberty, and the liberty is forfeited by misuser or non-user, the judgment shall be, that it be seized into the King's hands; and the reason given for the distinction is, that where the liberty or franchise has been usurped, the King cannot have that which never legally existed; but in cases of an abuser or non-user of a franchise once lawfully granted, the King resumes that which originally flowed from his bounty (e), and this course in the latter case, it has been said, is most beneficial for the subject, who, though by forfeiture, mis-

(a) 2 Inst. 282.

(b) Co. Ent. 27 b.

(c) Vid. the case of the quo. war. against the city of London, and Sir James Smith's case, 4 Mod. 52, Skin. 295, 1 Show. 263, Carth. 217.

(d) 15 Ed. 4 f. 7 b.

(e) Sawyer's Arg. quo war. 17. 2 Term Rep. 551.

pleading, or default, he may lose his liberty, may have recourse to the King's mercy for restitution (*a*).

FROM this it would seem, that the only cases in which judgment of *ouster only* ought to be given, is where there is no *colour* of title in the defendant, or where a franchise is claimed by prescription, but it is such, that by the law it cannot be so claimed.

As if a man claim to hold a court baron in virtue of a manor held by copy of another manor; there judgment of *ouster only* shall be given, because a copyholder being only tenant at will, cannot hold a court baron to have forfeitures, and hold pleas in a writ of right (*b*).

BUT where there is a *colour* of title, but the pleading of the defendant defective, there is only judgment of seizure, and not of ouster, as in the case of the abbot of Strata Marcella (*c*).

So, in the case of New Malton, though the issue that the corporation was by prescription, was tried against them; yet as they had long acted as a corporation, and might have mispleaded their title in claiming that by prescription which commenced by grant within time of memory, judgment only of seizure was given, and not of ouster (*d*).

WHERE grants appear, but either the parties are not capable of taking, or the liberty or privilege granted, not allowable by law, the course has been to enter a mixt judgment both of seizure and ouster (*e*).

THUS, in the case of the inhabitants of Denbigh, who claimed by charter several liberties, but it appearing, that they were not a corporation, and consequently had no ca-

(*a*) Sawyer's Arg. loc. cit.

(*b*) Rex. v. Stanton, Yelv. 190. Cro. Jac. 259, cited Sawyer's Arg. loc. cit. (*c*) 9 Co. 24 a. Co. Ent. 43 a.

(*d*) Sawyer's Arg. loc. cit.

(*e*) Id. ibid.

capacity to take, yet the usurpation being by colour of letters patent, the judgment was mixed both of seizure and ouster (*a*).

So, where a quo warranto was brought against one Cusack, and other aldermen of Dublin, for claiming, among other things, that they, exclusive of others, should buy and sell all merchandizes, that nobody should buy of another, or sell to another, and that all merchandizes should be brought to their common hall; and they pleaded a charter of Queen Elizabeth: the court of King's Bench in England, on a writ of error from Ireland, were of opinion, that the liberties granted did not pass nor could be lawfully used: but the usurpation being by colour of a grant, judgment of seizure, as well as ouster, was given (*b*).

IN addition to the judgment of seizure or of ouster, or of seizure *and* ouster, except only in the case of ouster on disclaimer, there is also judgment, that the defendants be taken to make fine to the King for the usurpation (*c*). And in this respect, it seems the judgment in the information differs from that in the writ of QUO WARRANTO; for in the latter, it is apprehended, there could be no judgment of *capias pro fine*: the defendant was in the nature of a plaintiff; he made his claim; if he failed in making it good, the judgment was not *capias pro fine*, but *quod sit in misericordia* (*d*).

AFTER judgment, the regular course is to issue a writ of seizure to the sheriff, which, after reciting the proceedings in the quo warranto, commands him to seize the liber-

(*a*) Co. Ent. 537—539 a.

(*b*) Palmer 1, 2 Roll. Rep. 113, cited Treby's Arg. quo war. 15. Sawyer's Arg. loc. cit.

(*c*) Co. Ent. quo war. per tot.

(*d*) Vid. Rast. Ent. 540 a. pl. 1, and Ld. C. B. Eyre's Arg. in dom. proc. in Rex v. Amery, 564.

at the trial of such information, in open court, certify upon record, that there was a reasonable cause for exhibiting such information; and in case the said informer or informers shall not, within three months next after the said costs taxed, and demand made thereof, pay to the said defendant or defendants, the said costs, then the said defendant and defendants shall have the benefit of the said recognizance to compel them thereunto."

THE words in the beginning of the act, "that he shall not, *without* leave of the court, file any information, nor issue out any process thereupon, *before* he shall have taken a recognizance," are somewhat ambiguous, and might be construed, "that *after* he had taken a recognizance, he might file an information *without* leave:" But the true construction has been held to be, "that he shall file *no* information without leave, nor issue out any process thereupon without recognizance (a).

To whatever sum the costs of the defendant may amount, he cannot, on this statute, have more than the *amount* of the recognizance (b); nor, on the application for an information, will the court compel the prosecutor to give security for the costs over and above the 20l. (c).

By statute 9 Ann. c. 20, after reciting "that divers persons had of late illegally intruded themselves into, and taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and *other* offices, within cities, towns corporate, *boroughs* and *places*, within that part of Great Britain called England and Wales; and where such offices were annual offices, it had been found very difficult, if not impracticable, by the laws then in being, to bring to a trial

(a) Pr. Ld. Hardwicke, in *Rex. v. Howell*, B. R. H. 248.

(b) *Id. ibid.* 2 Str. 1042. 2 Term Rep. 147.

(c) 2 Term Rep. 197.

and determination the right of such persons to the said offices, within the compass of the year, and where such offices were not annual offices, it had been found difficult to try and determine the right of such persons to such offices, before they had done divers acts in their said offices, prejudicial to the peace, order, and good government, within such cities, towns corporate, boroughs, and places, in which they had respectively acted:"—it is enacted (a) "that for the future, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the *said* offices or *franchises* (b), it shall and may be lawful for the *proper* officer in each of the respective courts * of King's Bench, sessions of counties palatine, and great sessions of Wales,* with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a QUO WARRANTO, at the *relation* of any person or persons, desiring to sue or prosecute the same, and who *shall be mentioned in such information or informations to be the relator or relators* against such person or persons, so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed in such manner as is usual in cases of information in the nature of QUO WARRANTO; and if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises, may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one

(a) S. 4.

(b) This relates to the place of burgess or freeman, which is mentioned in that part of the preamble which relates to mandamus's; so that though the preamble, with respect to quo warranto's, does not mention the place of freeman or burgess, the enacting part gives a remedy against an intruder.

such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of a *QUO WARRANTO* shall be sued or prosecuted, shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited, to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of *QUO WARRANTO*, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary notwithstanding."

"AND in case any person or persons, against whom any information or informations, in the nature of a *quo warranto*, shall, in any of the said cases, be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said franchises, it shall and may be lawful for the said courts respectively, as well to give judgment of *ouster* against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful for the said courts respectively, to give judgment, that the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators"—————s. 5.

THE court may allow convenient time to the defendant or prosecutor, to plead, reply, rejoin, or demur.——f. 6.

AND the statute for the amendment of the law, and all the statutes of Jeofayles, are extended to proceedings under this act.——f. 7.

THESE two statutes leave the power of the attorney general with respect to filing informations, whether in the nature of quo warranto, or not, exactly as it was at common law; for that of 4 and 5 W. and M. expressly provides, that it shall not be construed to extend to any other information than such as shall be exhibited in the name of their Majesties coroner or attorney in the court of King's Bench for the time being, commonly called the Master of the Crown Office: and that of 9 Anne only introduces some provisions with respect to informations in cases within the meaning of it, filed in the name of the latter officer (*a*). In point of fact there are several records in the crown office, of informations in the nature of quo warranto, filed in the name of the attorney general, in the intermediate time between the two statutes, and since the passing of the last, as well in cases within the *meaning* of the last, as in other cases (*b*).

WHETHER the statute of 4 and 5 W. and M. extends to informations in the nature of QUO WARRANTO, depends on the question, whether the King's coroner and attorney either had before, or has since that statute, a power to file such informations: if he had that power before, the statute does not take it away; if he had not, the statute does not give it him (*c*): if he had it before, the statute clearly extends to such informations; because, though it may be ob-

(*a*) Vid. 2 Hawk. Leach, 371.

(*b*) For this information I am indebted to Mr. Dealtry, of the crown office.

(*c*) Per Ld. Mansfield, 3 Bur. 1817.

jected, that an information in the nature of a quo warranto, being a mode of trying a right, is not within the meaning of the statute, which mentioning trespasses, batteries, and *other misdemeanors*, may reasonably be construed to intend *such* other misdemeanors as before specified; yet as this is a remedial law, and therefore ought to be liberally construed; and as informations in the nature of quo warranto may be as vexatious as any other; as they always suppose the usurpation of some franchise, and every such usurpation is a misdemeanor, the statute certainly extends to such informations, if the King's coroner and attorney had the power of filing them (*a*).

WHETHER there be any records in the crown office of informations in the nature of quo warranto filed in the name of this officer previous to this statute of W. and M. I have had no opportunity of learning; but I have not been able to find the *report* of any such case: very soon *after* the statute, however, *some* cases of this kind are reported, and the records of *more* appear in the office: in the 5th of Anne, particularly, there are several records of informations for usurping offices within the provisions of the 9th of Anne, as mayor, bailiff, capital burghs (*b*), which clearly shews, that this latter statute did not first *introduce* these informations, but only made some provisions with respect to the prosecution of them. *Since* the statute of Anne, there are many instances of informations in the nature of quo warranto, in cases manifestly *not* on that statute.

By an examination of the cases, the distinction between the power of the attorney general and the master of the crown office seems to be this, that the power of the lat-

(*a*) Vid. 2 Hawk. Leach, 372.

(*b*) Ex informatione Mr. Dealtry.

ter is confined to cases which concern the public government, whereas that of the former extends also to cases which only concern the *private* rights of the crown (*a*).

IN Hilary term, 10 William the third, an information, in the nature of quo warranto, was permitted to be filed, by the master of the Crown Office, against the mayor and aldermen of Hertford, to shew by what authority they admitted persons, who did not reside within the borough, to the freedom of the corporation (*b*). The court made no question about the power of the coroner, by the leave of the court, to *file* the information, and thought it a proper proceeding, because there was no other way to try the question of right, nor to redress the parties concerned. But they held that he ought to have taken a recognizance, and set aside the process, because he had omitted so to do. This shews clearly that the court thought the statute of William and Mary extended to informations in the nature of quo warranto, and consequently that they made no doubt about the power of the coroner and attorney to exhibit such informations at common law.

IN Easter, 11 W. 3, a rule was made on T. Warburton, Esquire, late mayor of Holt, in Denbighshire, to shew cause why an information should not be exhibited against him, to shew by what authority he claimed the privilege of electing and swearing foreigners to be burgeses of the said borough, without the consent of the bailiffs and burgeses: and in the term following the rule was made absolute.

(*a*) Vid. 2 Ld. Raym. 1409. B. R. H. 261. Str. 637. 3 Bur. 1814, 1817.

(*b*) 1 Ld. Raym. 426. 1 Salk. 55, 374, 376. Carth. 503. Vid. vol. 1, 337.

FROM this time to the 32 G. 2, several informations to the same effect were filed; and in Michaelmas, 9 G. 3, an application being made for leave to file an information of the same kind, against the mayor and town clerk of Northampton, the court had at first some difficulty about granting it, and ordered a search for precedents; on which those before mentioned being found, they permitted an information to be exhibited (*a*).

IN the 6 G. 1, an information, in the nature of quo warranto, was permitted to be filed against certain persons for acting as trustees under an act of parliament (*b*).

IN 10 G. 1, two several informations were granted against certain persons for setting up skin markets in Smithfield (*c*).

IN 14 G. 2, after several previous applications, a rule was made absolute against several persons who neglected to shew cause for holding a market, but discharged as against two, because they had neither taken toll, nor set up or encouraged the market, nor pretended any right to it, but on the contrary disclaimed it (*d*).

IN 18 G. 2, a rule was made absolute for an information against one Wilkins for holding a fair (*e*).

IN the 11 G. 1, the court granted an information, in nature of a quo warranto, against the defendant for exercising the office of steward of a court leet; but said they would not grant it in the case of a court baron, as that was only a private right (*f*).

IN 12 G. 1, the court refused an application for leave to file an information against Sir William Lowther, for set-

(*a*) Rex v. Breton, &c. 4 Bur. 2260. Vid. ante, 113, 114.

(*b*) Str. 299. 3 Bur. 1822. (*c*) 3 Bur. 1818, 1820, in marg.

(*d*) 3 Bur. 1820, 1821, 1822. (*e*) 3 Bur. 1814, 1818.

(*f*) Rex v. Hullston, Str. 621.

ting up a free warren, on the ground that it was only of a *private* nature, and therefore proper to be prosecuted only in the name of the attorney general, if the King should think fit (*a*).

IN 9 G. 2, a similar application was refused on the same ground (*b*).

IN 2 G. 2, an information, in the nature of quo warranto, was granted against bailiffs and others for levying a rate within a town (*c*).

IN 3 G. 2, against a person for acting as bailiff within a place not a corporation (*a*).

IN 15 G. 2, the court held, that an information, in the nature of quo warranto, would lie for claiming an *exclusive* ferry over the Thames; but in the case before them discharged the rule which had been made against the defendant, because it appeared that he only took money of the passengers, which did not amount to setting up an exclusive right (*e*).

IN 18 G. 2, an information, in the nature of quo warranto, against one Goudge, for exercising the office of a constable for Whitechapel (*f*), and a similar case cited, in which the court had made no difficulty with respect to the power of granting the information, but discharged the rule upon the merits (*g*).

IN 31 G. 2, a writ of error was brought in the King's Bench, on a judgment given in the court of great session, in the county of Denbigh, against the defendant, after a

(*a*) Sir William Lowther's case, 2 Ld. Raym. 1409.

(*b*) Ibbotson's case, B. R. H. 261.

(*c*) This appears from the records of the Crown Office.

(*d*) Rex v. Boyles, 2 Str. 836. 2 Ld. Raym. 1559.

(*e*) Rex v. Sir Thomas Reynell, 2 Str. 1161, 3 Bur. 1818, 1820, in marg.

(*f*) Rex v. Goudge, 2 Str. 1213.

(*g*) Rex v. Franchard, 2 Str. 1149.

verdict on an information brought against him in that court by the prothonotary and clerk of the crown there, *at the relation of ———, according to the form of the statute in that case made and provided.*

THE information, after setting forth the constitution of the town of Denbigh, and other necessary preliminaries, charged the defendant with holding a court of record within the borough, without any legal warrant.

THE defendant pleaded, that he did not hold the court, and disclaimed any right to hold it.

ON issue joined on this plea, the jury found that the defendant had held the court, and that he had no legal warrant so to do.

THE court gave judgment of ouster against him, and that the relator should recover his costs, *according to the form of the statute in such case made and provided.*

ON the writ of error the court of King's Bench confirmed the judgment as to the ouster of the defendant, but reversed it as to the costs; on the ground that the information did not charge the defendant with usurping the *office* of bailiff, but only with doing a single act which *belonged* to that office; and that therefore this was not a case within the statute of Queen Anne (a). This was plainly admitting, that independently of that statute, an information, in the nature of quo warranto, might be exhibited by the prothonotary of the court of great sessions, and consequently by the King's coroner and attorney in the court of King's Bench.

IN the 6 G. 3, an application being made for an information, in the nature of quo warranto, against several persons for holding a public fair or market at Wakefield, on every other Wednesday; the court expressed some doubt

(a) Rex v. Williams, 1 Bur. 402.

whether an information, in the nature of quo warranto, would lie in the name of the clerk of the crown, on the application of a *private* person: but on several of the cases before mentioned being cited, they granted a rule to shew cause: on cause being shewn, the court still expressed doubts on this point; but said, they were not called upon now to determine it, as on the *merits* of the case before them the rule must be discharged. On the day after, however, several of the cases before mentioned being cited, Lord Mansfield said, they supported the determination of yesterday, but that at the same time they supported the *general* ground on which the motion was founded; and Mr. J. Wilmot confessed they were strong, but said this was a matter of future consideration, when any future application should be made.

LORD MANSFIELD said, if any such application should be made in future, it would be proper to search the Crown Office, to see whether there were any instances of informations, in the nature of quo warranto, filed by the clerk of the crown in corporation causes before the 9th of Anne (*a*).

THAT search has been made (*b*), and the event is in favour of this officer's power, which so many subsequent cases confirm—particularly the case of the mayor and town clerk of Northampton before mentioned (*c*).

THE statute of Queen Anne gives full costs on verdict or judgment to the successful party, whether relator or defendant; but it is *only* in case of verdict or judgment that, under this statute, the defendant can have costs for a groundless prosecution; but it has been decided, that, if the prosecutor do not, at his own costs, procure the information to be tried within a year after issue joined, the de-

(*a*) *Rex v. Marsden, et al'*, 3 Bur. 1812, 1822.

(*b*) *Vid. ante*, p. 416.

(*c*) P. 418.

pendant is intitled to the benefit of the recognizance under the statute of William and Mary (*a*): which is a sufficient proof that the judges who so decided, thought that at the time of passing the latter statute, the master of the Crown Office was in possession of the power of filing informations in the nature of *quo warranto*, even in cases within the meaning of the statute of Anne.

WHAT cases are within the meaning of that statute has been the subject of some controversy, as the successful party is intitled to his costs only in such cases.

THE words of the statute are, "the offices of mayors, bailiffs, portreeves, and *other* offices within cities, towns corporate, *boroughs and places*:" the question has been whether these words express only corporation offices, or whether they extend to offices in boroughs and *other* places not corporate.—In favour of the latter opinion there are many instances in the Crown Office between the 12 Anne and 32 G. 3, of full costs having been taxed, in cases of information for offices in boroughs sending members to parliament, but not incorporated; and between 10 G. 1, and 24 G. 3, in places neither incorporated nor sending members to parliament (*b*).

IN favour of the former opinion we have several incidental observations in the cases of the King and Williams, and the King and Marsden, and a solemn decision in the case of the King against William Wallis and William Barrs, in the 34 G. 3.—In the case of Williams (*c*), Lord Mansfield said, the act was meant to extend to *all* officers of corporations as such; but that it was not within

(*a*) Rex v. Howell, B. R. H. 247. Rex v. Morgan, 2 Str. 1042, which appear to be the same case under different names.

(*b*) For this information I am indebted to Mr. Dealtry.

(*c*) Ante, p. 420.

the reason and meaning of the act, that it should extend generally to all offices or franchises exercised without authority from the crown, within a corporation: and that it was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party.

IN the same case, Denison and Foster, J. said, the word "franchises" in the act meant only *corporate* rights, or rights to freedom in corporations.

IN the case of Marsden (*a*), Yates, J. said in express terms, that the statute 9 Anne extended only to *corporation* offices.

THE case of the King against William Wallis and William Barrs was an information, in the nature of *quo warranto*, at the relation of R. King, against the defendants, calling on them to shew by what warrant they acted as constables of Birmingham. The defendants pleaded an election by a jury at a court leet, the issue taken on which was found for the Crown. Judgment of ouster was afterwards entered up, and judgment also for the costs, which were taxed at 246l. 10s. 5d. On this a rule was obtained by the defendants, calling on the prosecutor to shew cause why the taxation of costs should not be set aside, on the ground that this was not a case within the statute of Anne.

AFTER cause was shewn, the court expressed their opinion, that the preceding incidental observations had decided the question, and decided it rightly; that the word "places" in the act, only extended to offices in places of the same kind with those before enumerated; that the cases recorded in the Crown Office were in fact reducible to two, and as these had passed without argument, they could not weigh much in opposition to those observations.

(*a*) Ante, p. 421.

It was likewise remarked, that there was a material difference between the case of a person who was compellable to take upon himself a burthen some office, which he could not refuse without being liable to an indictment, and that of a person who voluntarily undertook an office from which he expected personal importance or some other advantage: and that it was unreasonable that a person supposed to be elected into an office of the first description, which that of the present defendants was, should be liable to pay the costs of a prosecution for ousting him, on account of some defect in his election (*a*).

THE cases in which informations in the nature of quo warranto are granted under this act, are where a man exercises a corporate franchise, or acts as a corporate officer, without having been duly elected and sworn or admitted, and where the office of a corporate officer becomes void by something subsequent.—The objections to an election arise either from the previous ineligibility of the person elected, the illegality of the votes of the electors, or the irregularity of the election itself; for all of which the reader must be referred to former parts of this work (*b*); as he must also for the regularity of swearing and admission.

It has been seen (*c*), that where a person in possession of one corporate office is elected to another incompatible with the first, the first is void: and therefore, where he continues to exercise the duties of the first, an information, in the nature of quo warranto, will lie against him for so doing.

So, where a person in possession of an office incurs a forfeiture, he may be removed by the proper body (*d*);

(*a*) *Rex v. William Wallis and William Barrs*, 5 Term Rep. 375.

(*b*) *Vid.* in vol. 1, c. 3, f. 6, 7, and vol. 2, c. 3, f. 8, per tot.

(*c*) Vol. 1, 369—375.

(*d*) *Vid.* c. 3, f. 9, vol. 2, 50.

and then, if he continue to execute the office, a quo warranto information lies against him.

BUT till he is actually removed an information does not lie; because the corporation, or select body possessing the power of amotion, are the best judges, in the first instance, how far misconduct or neglect may be a cause of forfeiture (*a*). If from corrupt motives the corporation neglect or refuse to exercise their power of amotion, the court of King's Bench, on a proper case being laid before them, will grant a mandamus to compel them (*b*).

To subject a man to an information in nature of quo warranto, it is necessary that there should be not only a *claim*, but an *user* of the franchise.

THUS, where an information filed in the court of King's Bench in Ireland, against nine persons, charged the defendants with usurping the franchises of free burgesses of the corporation of Newton, in that kingdom; the defendant Ponsonby and another of the defendants pleaded that they were duly elected free burgesses, but that they had *neither* been sworn *nor* had executed the franchises; and they traversed the usurpation; the prosecutor replied, that due notice had been given them of their having been elected free burgesses, and that they had neglected to be sworn.— On a general demurrer, judgment was given against them, as well as the other seven; and part of the judgment was, that the defendants should be *ousted* of their franchises. On a writ of error to the King's Bench in England, this judgment was reversed, on the principle, that judgment of *ouster* ought not to be given in an information in the nature of quo warranto, unless the case of the defendant was within the statute, which the case of these two defendants

(*a*) Vid. ante, p. 53. 2 Str. 820. Sayer, 247, 248. Rex v. Heaven, 2 Term Rep. 772.

(*b*) Sayer, 248, 249.

was held not to be : for as they had neglected to be sworn, the corporation might either have compelled them to be sworn, or might have elected other burgesses : but as they were not sworn, and had not exercised the franchises, they had never been in possession of them, and consequently could not be liable to a judgment of ouster for usurping them (a).

On an application for an information against one Whitwell, for claiming to be sheriff of Coventry, it appeared that the defendant had been elected to the office, and had tendered himself to be sworn ; but that it was thought not expedient to administer the oath, as he had not taken the sacrament within one year next before his election.

In support of the application it was urged, that as the defendant insisted on his election, there could be no sheriff capable of acting for the city, if it were refused. For that the court would not grant a mandamus to the corporation to proceed to another election, nor grant a criminal information against the defendant for not taking upon him the office, as that might subject him to the penalties of another law (b) : and that if the court were not now to interpose, the defendant would, after the expiration of six months from the time of his election, take upon himself the actual exercise of the office, without receiving the sacrament or taking the oaths (c).

THE court observed, that no instance had been produced, where an information, in the nature of quo warranto, had been granted against a party who had not been in the actual possession of the office or exercise of the franchise ; that in the case of Ponsonby, the court had expressly held there must be an *user* as well as a *claim* in order to found such an application : in the *present* case, the defendant did

(a) *Rex v. Ponsonby and eight others*, Sayer, 245.

(b) *Vid.* vol. 1, p. 347, 397.

(c) Vol. 1, p. 345, 346.

not claim to exercise the office of sheriff; he only claimed a right to take the oaths of office, in order that he might be *invested* with that corporate character: whether the court could interpose by granting a mandamus, or a criminal information, must depend on the particular circumstances of the case, on which they would decide, when it was regularly brought before them. They certainly could not entertain such an application as the present, no user by the defendant having been pretended (*a*).

WHERE the only act done by the party against whom an application is made for leave to file an information in the nature of quo warranto, is voting in an election for members of parliament, under any claim of right, the court will refuse it, on the ground that an enquiry into the *right* of voting belongs more properly to the House of Commons (*b*).

BUT in the case of the borough of Horsham, in the 30 G. 3, the court held, that an information, in the nature of quo warranto, would lie against a person claiming to have a right of voting by virtue of a burgage tenement; and they said, the point had been so often ruled, that it was too late to raise the question (*c*).

THE time within which a title to a corporate office or franchise might be impeached by a quo warranto information, was, by the common law, indefinite, nor was it till lately fixed by any statute: the court, therefore, on different occasions adopted a different rule, according to the circumstances of the case.

IN the 9 G. 1, an application being made for an information against Powell and Jones, to shew by what authority they

(*a*) Rex v. Whitwell, 5 Term Rep. 85.

(*b*) Rex v. Harvey, et al', 1 Str. 547.

(*c*) 3 Term Rep. 599, n.

claimed to be *capital* burgesses of the borough of Brecknock, it was suggested, that they were never duly chosen *burgesses*, and consequently that they could not be *capital* burgesses: in answer to this it was stated, that Powell had been a burgess, in point of fact, ever since the year 1708 (*a*), and Jones since 1712; and contended, that it would be of fatal consequence to the borough, after so long an acquiescence, to render void all the corporate acts done by them during so long a period. But the court held, that long acquiescence could be no reason against the rule which was made on the mere right; that length of time could never establish a right which had been gained by usurpation; and that a right should not be intended when the merits were controverted, and no collateral point disputed (*b*).

IN the 10 G. 1, a similar application being made against Pyke and Prideaux, to shew by what authority they claimed to be capital burgesses; they swore, that they had been fourteen years in quiet possession: the solicitor general, who made the application, cited the case of Alexander John, mentioned in a former part of this work (*c*), as an authority, that length of time was no answer to an application of this kind: but the court refused the information; and said, that the reason why one was granted against John, was, that he had supported himself in possession by fraud and tricks; but the possession of the present defendants had not been disputed till very lately (*d*).

AND in the case of the King against the mayor of Helstone, in the 12 G. 1, it appeared, that the defendant was

(*a*) This being 1724.

(*b*) Rex. v. Powell et al'. 8 Mod. 165.

(*c*) Vid. vol. 1, 381—384.

(*d*) Rex v. Pyke, 8 Mod. 286, cited 1 Term Rep. 4 n. 3 Term Rep. 311.

elected alderman eight years before ; and there was an entry in the corporation books of his having taken the oath of office, and the oaths of allegiance and supremacy : though the town clerk who officiated at the time of the election, swore, that he had not in fact administered the oath of allegiance, though he made the entry as it appeared to be ; yet the court refused an information, as it was not a *recent* complaint (a).

IN a case which occurred in the 4 G. 3 (b), Lord Mansfield observed, that no certain rule was fixed for the particular and exact length of time which should be considered as an acquiescence, and that, perhaps, it was better, that none *should* be fixed, because circumstances might, in this respect, very much vary the case.

BUT afterwards, in the 7 G. 3, application being made for informations against a great number of the corporators of the borough of Winchelsea, to shew by what right they claimed to hold their offices ; and it appearing that some of them had been in possession for more than twenty years, some near twenty years, and some considerably less than that time ; the court thought it right to fix a certain point of limitation ; beyond which they would not disturb a possession in which there had been a long acquiescence ; and in analogy to other cases of limitation, they fixed the period of twenty years, as the limit beyond which they would, under no circumstances whatever, listen to an application of this kind : but that in every case *within* twenty years, their granting or refusing the rule, would depend on the *circumstances* of the case, that should happen to be laid before them. They declared, however, that, notwithstanding this limitation, a *great* length of quiet possession,

(a) Rex v. Williams, Mayor of Helstone, 1 Str. 677, cited 3 Term Rep. 311.

(b) Rex. v. Latham et al', 3 Bur. 1485.

though

though somewhat *short* of this period, might and ought to be taken into consideration, as *one* of the circumstances which might deserve to have its due weight in guiding their discretion. Many opportunities of defence, they said, many proofs of facts tending to defence, might be lost; many circumstances might be forgotten, or not capable of being made out, after a long undisputed quiet possession, which might have been easily recollected or proved; many witnesses might be dead or not to be found, who might easily have been produced, if the prosecution had been commenced within a recent and reasonable time (*a*).

IN a subsequent case (*b*), it was settled that the last day of the twenty years should not be before the day on which the court might make the rule absolute for granting the information; so that if the application for a rule to shew cause should be made on a day so near to the expiration of twenty years, that by the course of the court it could not be made absolute within that time, this alone should be a sufficient reason for rejecting the application.

THE rule laid down in these cases, was, on many subsequent occasions, recognized and explained (*c*), and Mr. Justice Buller, in the case of the King and Stacey, alluding to the case of Pyke and Prideaux before mentioned, said, that if the court should at any time be disposed to abridge the period of twenty years, he should certainly concur (*d*): in another case (*e*), he cited both that of Pyke and Prideaux, and that of the mayor of Helstone, as authorities for abridging the time: and at last, in the case of the King and Dickin (*f*), the court unanimously laid down this rule,

(*a*) Vid. the Winchelsea causes, 4 Bur. 1962, 2022, 2120.

(*b*) Rex. v. William Rogers, burgesses of Helston, 4 Bur. 2523.

(*c*) Vid. Cowp. 75. 1 Term Rep. 1, 2 Term Rep. 767.

(*d*) 1 Term Rep. 4.

(*e*) Rex v. Newling, 3 Term Rep. 310.

(*f*) 4 Term Rep. 282.

“that

“that in future they would limit their own discretion in granting applications of this kind to *six* years, and that beyond this time, they would not, under any circumstances, suffer a party, who had been so long in possession of his franchise, to be disturbed.”

BUT these rules applied only to applications made on behalf of private persons, and the attorney general might, notwithstanding, at any distance of time, have filed an information in the nature of *QUO WARRANTO* on behalf of the crown. But by 32 G. 3, c. 58, it is enacted, “that the defendant to *any* information in the nature of *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited with leave of the court, or by his Majesty’s attorney general, or *other* officer of the crown, on behalf of his Majesty, by virtue of any royal prerogative or otherwise, may plead, that he had first actually taken upon himself, or held or executed the office or franchise, which is the subject of such information, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office or franchise; which plea may be pleaded either singly or together, with such plea as he might have lawfully pleaded before the passing of the act, or such several pleas as the court on motion shall allow; and if on the trial of such information, the issue joined on the plea aforesaid, shall be found for the defendant, he shall be intitled to judgment, and to such and the like costs as he would, by law, have been intitled to, if a verdict and judgment had been given for him on the merits of his title.”

BUT it is provided, “that in every such case, the prosecutor of such information may reply to such plea, any forfeiture,

forfeiture, surrender, or avoidance, by the defendant, of such office or franchise, happening within six years before the exhibiting of such information, on which the defendant may take issue, and shall be intitled to costs in manner aforesaid."——s. 2.

To obtain leave to file an information, the party applying must lay a proper case before the court, verified by affidavit, on which the court will grant a rule on the defendant to shew cause: it was formerly, indeed, so much the practice of the court to grant *quo warranto* informations, as of course, that it was held prudent never to shew cause against the rule, for fear of disclosing the grounds on which the defendant rested his defence.

BUT since these matters have come more under consideration, it is no longer a matter of course; and the court have, on several occasions, declared, that it was the intention of the legislature, that they should exercise a sound discretion according to the particular circumstances of the respective cases that came before them, and should not, without good reason, disturb the quiet of any corporation.(a).

WHERE the right, or the fact, on which the right depends, is disputed; that is a sufficient reason for granting an information, if the application be made within the proper time (b). So, where the right depends on a point of new or doubtful law (c).

THE conduct of the parties, on whose behalf the application is made, will weigh much with the court, in some instances, in granting or refusing an information.

WHERE residence, and paying scot and lot, were required by the constitution of the corporation, as a pre-

(a) Per Ld. Mansfield, 1 Term Rep. 2, vid. 4 Bur. 1964, 2022, 2121. (b) Vid. 3 Bur. 1485. (c) Vid. Cowp. 58, Doug. 397 (382).

ous qualification, and it was *admitted*, that the defendant had not that previous qualification; yet, as it appeared that he had ever since his election resided and paid scot and lot; that some of the persons, on whose affidavits the application was made, had voted for him; that on subsequent occasions they had voted with him; that he had afterwards been elected to different offices without any objection from these parties; and that many derivative rights would be affected by a flaw in his title: and as the parties applying did not shew that any interest of their own, or to any other person, depended on invalidating it; the court refused an information (*a*).

So, where it appeared, that the objection to the defendant's title was, that the election had not been in conformity to a bye law; but that the corporation had afterwards come to a resolution not to enforce that bye law, and that if the franchise of any person should be impeached in consequence of it, he should be defended at the public expence; and that the relator had concurred in this resolution; the court discharged the rule (*b*).

BUT, where the person, on whose affidavit the application is made, knew all the objections to the defendant's election, at the time, but had no power of remonstrating against the proceedings; where he is not in fact the prosecutor, but merely a witness, as in the case of an application on the affidavit of a town clerk; the application will not be refused, merely on account of that previous knowledge (*c*).

(*a*) Vid. *Rex v. Dawes*, and *Rex v. Marten*, 4 Bur. 2120, and the case of *Edwin Wardroper*, 4 Bur. 1963, and of *Richard Wardroper*, 4 Bur. 2024.

(*b*) *Rex v. Mortlock*, 3 Term Rep. 300.

(*c*) Vid. *Rex v. Binfield et al*., Cowp. 75.

So, where the relators have concurred in the election of the defendant without knowing of a latent objection to his eligibility, as that he had not taken the sacrament within a year before his election; their concurrence will be no objection to granting the information (*a*).

So, where the application is made on the affidavit of several persons, all of whom but one concurred in the election of the defendant; if he who did not concur will avow himself the relator, and render himself responsible for the costs, his being joined with the others who concurred in the election, will be no reason for refusing the information (*b*).

It is no reason for refusing an information, that informations formerly granted, for the same cause, have been abandoned, as that may have been by collusion (*c*).

BUT it is a good reason, that the prosecutor stands exactly in the same circumstances with the defendant (*d*).

So, where the application is founded on a mere blunder at the election of a person, under whom the defendant derives his title, that, with length of time, will be a reason to refuse the information (*e*).

In cases where there has been a long acquiescence, and where the objection, if it prevailed, might tend to dissolve the corporation, the court may refuse the application (*f*): but, though a *great number* of derivative titles may be affected by judgment of ouster against the defendant, yet, if it be confessed that elections may still be made, the court will not refuse it on that ground alone (*g*).

(*a*) Vid. *Rex v. Smith*, 3 Term Rep. 573.

(*b*) *Rex v. G. Symmons*, 4 Term Rep. 223.

(*c*) 2 Term Rep. 770. (*d*) Id. 771. (*e*) 1 Term Rep. 3, 4.

(*f*) Cowp. 59. (*g*) *Rex v. Bond*, 2 Term Rep. 767.

WHERE the application is made in the names of persons unconnected with the corporation, that will in general be a strong reason for refusing it (*a*): but where the objection to the defendant's title is, that he had not received the sacrament within a year before his election, an information will be granted on the application of a stranger, because such an omission is against a general law, which affects all the corporations in the kingdom (*b*).

WHERE an application was made for an information, twelve years after the election, and it was sworn by the relator that he *believed* the defendant was not regularly sworn into office; but it was shewn on the other side, that by an entry in the corporation books, it appeared he was regularly sworn, the court refused the application (*c*).

WHERE the affidavit of the relator omits to state a material fact, as where it omits to state the mode of election; but that fact is afterwards stated in the defendant's affidavit, the court may use the latter in support of the application (*d*).

It does not seem to be a reason for refusing an information, that the objection to the defendant's title arises from a defect in the title of some other person through whom he claims, provided the application be made within the proper time (*e*). It is admitted, that where judgment of *ouster* has been given against a person through whom a title is derived, that may be a reason for granting an information to impeach the *derivative* title (*f*): it is also

(*a*) Vid. 1 Term Rep. 23.

(*b*) Vid. Rex v. Brown, 3 Term Rep. 574 n.

(*c*) Rex v. John Newling, 3 Term Rep. 310.

(*d*) Vid. Rex v. Mein, 3 Term Rep. 596.

(*e*) Vid. 8 Mod. 216.

(*f*) Vid. Str. 1109. Andr. 389. 5 Bur. Rep. 2601. Cowp. 500.

admitted, that the title of a defendant to an information may be impeached by an issue introduced on the record, respecting the title of the person under whom he claims (*a*), though the latter has not been ousted on an information filed against *him*. It may, or it may not, be possible to impeach the original right on which the derivative title depends, by an information filed against the person who claimed to exercise that original right. Whatever may be the case, where that may be done, but in fact has *not* been done, it has been lately decided, that where it cannot be done, the original right may be impeached in an information against the person whose derivative title depends upon it.—By the constitution of the borough of Fowey in Cornwall, the right of voting in the election of Portreeve, belongs exclusively to such persons as are duly admitted the Prince of Wales's tenants on the court rolls of the manor and borough of Fowey, in right of the freehold estates within the borough, and to such inhabitants as pay scot and lot. At the election of a Portreeve, several persons had voted as freehold tenants, who, it was alleged, had not been properly admitted, and the validity of the election depended on the right of those persons to vote. In answer to a rule for an information against the person elected, it was strongly urged, that the right of the electors could not be attacked in a proceeding instituted against the elected. But Lord Kenyon, who delivered the opinion of the court, observed, that this rule could not be applied to the present case. It was plain that an information would not lie against these persons for exercising a right incidental to their freehold. There was, therefore, an absolute necessity of discussing their right in a proceeding

(*a*) Ibid.

against

against the person elected, as there was no other mode by which it could be impeached (*a*).

BUT, where the person on whose right the derivative title depends, has enjoyed his franchise so long that the court would refuse to grant an information to impeach the latter directly, they will not permit it to be impeached indirectly by an information against the person claiming the derivative title (*b*).

So, it seems, they will not grant an information against the person claiming the derivative title, after the death of the person on the validity of whose right it depends (*c*).

WHERE the application for an information in the nature of quo warranto appears frivolous and vexatious, the rule will be discharged with costs (*d*).

It seems, that the court will not grant a rule for such an information on the last day of term (*e*).

WHERE the person against whom application is made for a quo warranto information, suffers the rule to be made absolute without shewing cause; or on the information being granted, suffers judgment to go by default, the court will permit other corporators, whose title may be affected by judgment of ouster being pronounced against him, to defend his title, on their undertaking to do so at their own expence, and indemnifying him against all costs (*f*).

THAT *several* different franchises claimed by the *same* person, may be the subject of one information, appears

(*a*) Rex v. Mein, 3 Term Rep. 596.

(*b*) Vid. Rex v. Stephens, 1 Bur. 433. Rex v. G. Peacock, 4 Term Rep. 684. (*c*) Vid. Rex v. Spearing, 1 Term Rep. 4, n.

(*d*) Vid. 2 Str. 1039. 2 Bur. 780. 3 Term Rep. 301.

(*e*) Vid. Rex v. Davies, Sayer, 241.

(*f*) Vid. 4 Bur. 2523. 3 Term Rep. 310.

from the authorities cited in a former part of this section (*a*), and from the several books of entries (*b*). The statute of Anne gives the court authority, in their discretion, to grant *one* information to try the rights of several persons (*c*); and an Irish statute (*d*) gives the same authority to the court of King's Bench in Ireland.

IN an information at common law, there ought to be no relator; yet if a relator be mentioned, it is only surplusage, and may be rejected (*e*).

THOUGH the information cannot be filed without leave of the court, yet that leave is never stated on the record (*f*).

THE process usually issued to bring the defendant into court is a writ of subpoena, and if that be disobeyed, an attachment: but if the defendant cannot be served with the subpoena, it is said, the process is *venire facias* and *distringas* (*g*).

IN the case of the mayor of Hedon, Lord Chief Justice Lee said, "there never was any process to outlawry on an *information* in nature of *quo warranto*, this not being like a *quo warranto* by original writ, which was in use before this manner of proceeding" (*h*). His lordship clearly means to contrast the writ of *quo warranto*, with an information in the nature of it, under this statute of Anne; taking it for granted that process of outlawry lay in the former, and denying that it lies in the latter: but whatever may be the case with the information, it is most probable that process of outlawry did not lie on the original

(*a*) Vid. p. 410.

(*b*) Vid. Co. Ent. 527, &c. Cowp. 499.

(*c*) Vid. p. 413.

(*d*) 19 G. 2, c. 12. Vid. Cowp. 494, 500. Sayer, 245. 1 Bur. 573.

(*e*) Vid. Rex v. Williams, 1 Bur. 402, 408. Bul. N. P. 211.

(*f*) Cowp. 501.

(*g*) 1 Sid. 86.

(*h*) Rex v. mayor of Hedon, 1 Will. 245.

writ. That process only lies in criminal cases, and in *personal* actions; but the writ of quo warranto was a writ of right resembling more a *real* than a *personal* action. The information was at first considered as a *criminal*, though it is now considered as a *civil* proceeding (*a*), and certainly partakes more of the nature of a *personal* than of a *real* action: if, therefore, there be any distinction between the writ and the information, with respect to process of outlawry, I should rather apprehend that it lies in the latter, but did not lie in the former. But as it is not probable that any person who had shewn cause against a rule for an information, would refuse to appear to it when granted, I suppose this question was never directly determined (*b*).

THOUGH the statute of 9 Queen Anne extends the statute for the amendment of the law to writs of mandamus, and informations in the nature of quo warranto, "for any of the matters in the former act mentioned:" yet it does not enable the defendant to plead more than one plea, even with the leave of the court (*c*). But where he is charged with the usurpation of several offices, he may plead distinct pleas to the several charges (*a*).

THE defendant may plead in abatement, but the plea must have an affidavit annexed to it (*e*).

BUT it seems, that he cannot plead a plea of misnomer in his addition; for it is said that the statute of additions does not extend to quo warranto informations: but as this observation is founded on an opinion that process of out-

(*a*) Rex v. Francis, 2 Term Rep. 484.

(*b*) Vid. p. 405.

(*c*) Vid. Rex. v. Newland, Sayer, 96. Vid. 4 Bur. 2146.

(*d*) Vid. p. 410.

(*e*) Rex v. Jones, 2 Str. 1161.

lawry does not lie on *such* informations, it is subject to the same doubt as that opinion (*a*).

THE plea in bar must set out the defendant's title at length, and conclude with a general traverse, "without this, that he usurped, &c." and issue should not be taken on the part of the crown, on the general traverse; but the replication should be to the special matter, that the defendant may know how to apply his defence (*b*).

WHERE several things are necessary to constitute a complete title in the defendant, the crown may take issue on each, and if any one of the issues on a fact material to the title be found against the defendant, judgment of ouster shall be given against him.—Thus, where an information in the nature of quo warranto was exhibited against one Pender, to shew by what authority he exercised the office of mayor of Penryn, and two issues were joined thereon; one, whether he was duly elected, and the other, whether he was duly sworn; the first issue was found for the defendant, and the second for the crown; judgment of ouster was given; because, as against the crown, want of being sworn was as much as want of an election; and to be elected, and to be sworn, being both necessary to constitute the title to the office, the jury finding that he was not sworn, had found in effect, that he had no title (*c*).—On a writ of error on this judgment in the House of Lords, it was affirmed (*d*).

THE authority of this case was recognized in a subsequent one, where the defendant, in his plea, set forth the

• (*a*) Vid. *supra*, Rex v. mayor of Hedon, 1 Wils. 244, p. 438.

(*b*) Rex v. Blagden, Gilb. Rep. 145.

(*c*) Rex v. Hearle, 1 Str. 582, 625, 627.

(*d*) 2 Ld. Raym. 1447.

constitution of the borough, and alleged he was chosen according to that constitution, and that he was sworn and admitted into the office: to this plea there was a replication, on which several issues were joined, the fourth of which was that the defendant was not sworn nor admitted into the office, as in his plea he had alleged. On the trial, the defendant was unable to prove his having been sworn and admitted, on account of an irregularity of the stamping of the instrument, which he produced for that purpose. This issue, therefore, by the direction of the court, was found for the crown. The court then acquainted the counsel for the defendant, that if they insisted on having a verdict on the other issues, the trial must proceed, and the evidence be heard on both sides, and then it must be left to the consideration of the jury, whether they would find for the King or for the defendant as to those issues: but they at the same time reminded them, that though a verdict on those issues should be found for the defendant, yet judgment of *ouster* must, according to the former case, be given against him (a).

WHERE the defendant sets forth a bad title to the office, and confesses the user, that amounts to a confession of the usurpation, and if an immaterial issue is joined, and a verdict found on which the court cannot give judgment, yet they will not grant a repleader, but proceed to give judgment on the plea: if a repleader were granted, the defendant could not mend his case; the plea would stand, and after the formality of a demurrer, judgment must be given on the goodness or badness of the plea; and if the justification is such, in point of matter and substance, as

(a) Rex v. Robt. Reeks, 2 Ld. Raym. 1445. Vid. etiam Rex v. Latham, 3 Bur. 1485.

cannot,

cannot, if put into *any* form of words, be a good defence to the defendant, it is to no purpose to grant a repleader (*a*).

BUT where the defendant, in his plea, confesses an usurpation during *part* of the time laid in the information, but insists on an election afterwards under which he continued to hold the office, judgment of *ouster*, as to the time confessed, ought not to be given against him, but only a judgment of "capiatur pro fine," as a punishment for his usurpation: for if judgment of *ouster* were entered, it would follow, that, when a person has once exercised an office without authority, he becomes, so long as he does so, incapable of being rightfully elected. And if, in such a case, judgment of *ouster* be *actually* entered, the court, on application for that purpose, will order the whole to be expunged, but that part which relates to the fine (*b*).

WHERE one material issue is found for the crown, the prosecutor is intitled to costs on all the issues, whatever number may be found for the defendant (*c*).

IF on an information against the defendant for exercising an office in a corporation, he make title as being elected under the mayoralty of a particular person; on issue joined, whether that person was mayor or not, a record of judgment of *ouster* against the latter may be read in evidence, to shew that he was not mayor: but it is only conclusive, if it be not shewn that the judgment was obtained by fraud or collusion (*d*).

AND, if the person, under whom the defendant claims, be dead at the time when the issue, "whether he was mayor

(*a*) *Rex v. Philips*, 1 Str. 394, 397, cited 1 Bur. 302, 305.

(*b*) *Rex v. Biddle and Taylor*, 2 Ld. Raym. 952.

(*c*) *Rex v. Downes*, 1 Term Rep. 453.

(*d*) *Rex v. Hebden*, 2 Str. 1109. Andr. 389. *Rex v. Grimes*, 5 Bur. 2598, 2601.

or not," is tried, the only evidence that will be admitted, will be to prove whether he was mayor or not in point of fact.

IN the case of the King and Spearing, tried at Winchester assizes before Mr. Justice Blackstone in 1771, it appeared that the defendant had been sworn into office before the Duke of Bolton, as mayor of Winchester.—The record, among other issues, contained one, that the Duke of Bolton was not mayor, which depended on his having been an inhabitant at the time he had been chosen. The duke being dead, the judge would not suffer the parties to go into evidence to prove him *not* an inhabitant at the time of his election; but confined them to the proof of the fact, whether he was actually mayor or not, which was shewn by the entry in the corporation books (a).

WHERE the persons, on whose right to vote the validity of the defendant's title depends, were at the time of his election in the actual possession of the franchise in virtue of which they voted; at the trial, no inquiry can be made into their right, unless an issue has been taken upon it (b).

AND by statute 32 G. 3, c. 58, s. 3, it is enacted, that if any person, against whom an information in the nature of quo warranto shall be exhibited, shall derive title, under an election, nomination, swearing into office, or admission of any other person or persons, the title of the defendant shall not be defeated or affected by reason of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons, under whom title shall be derived, was

(a) Rex v. Spearing, 1 Term Rep. 4, n.

(b) Cowp. 503, 507.

or were in exercise *de facto* of the franchise or office, in virtue of which he or they so elected, nominated, swore in, or admitted, at a period six years at least, previous to the time of filing such information, unless his or their title shall have been questioned by a legal proceeding, carried on with effect" (a).

THIS provision must be considered as applying only to cases where *issue* is taken on the title of the person through whom the defendant claims; for, as has just been seen, no inquiry can be made into such title, where no issue has been taken upon it (b).

WHERE it is alleged, that, by the constitution of a corporation by prescription, no person shall be a common councilman who does not inhabit the borough, and also hold a burgage tenure, a person who is both an inhabitant, and holds a burgage tenure, cannot be admitted as a witness to prove this constitution, because he is to prove a right in himself, and such as have his qualifications, exclusively of all others: but one who is only an inhabitant, and has no burgage tenure, may be admitted, because he is to prove no exclusive right in himself (c).

AND a member of a corporation, who has formerly acted under the right claimed, may be a witness to prove the usage.

ON a motion for a new trial on behalf of the defendant in an information in the nature of quo warranto for the office of mayor, the question on which his title turned was, "whether the former mayor had a right to name two elisors to return a jury, if the town clerk, who might no-

(a) St. 32 G. 3, c. 58, s. 3.

(b) Vid. ante, p. 443, and Rex v. Mein, 3 Term Rep. 596. 4 Term Rep. 480.

(c) Stevenson v. mayor of Appleby, &c. 2 Ld. Raym. 1353.

minate one, was absent, or refused?" The second elisor nominated by the mayor, was called as a witness to prove the custom; and it was objected to his competency, that he having acted under such a nomination, was liable to an information, and therefore could not be examined. The judge, who tried the cause, rejected him. The foundation of the motion for a new trial, was, that the objection went only to his credit. The court were of that opinion, as he was but an officer for the day, whose power had long since been at an end. They observed, that it was but a bare authority, and not an interest; and that nothing was more common than to examine former mayors as to the right (*a*).

EVIDENCE of an order of *restoration* of a burges, together with proof of his having acted in that capacity, is sufficient to shew that he was a burges in point of fact, without proof that he was actually admitted (*b*).

It was formerly a subject of much discussion, whether a new trial could be granted in a quo warranto information, when the verdict was in favour of the defendant (*c*). This depended chiefly on the question, whether such an information was a criminal prosecution: but since it has been held, that it is merely a civil proceeding, there is no doubt but that a new trial may be granted, where a verdict has been given in favour of the defendant, as well as where it has been given in favour of the crown (*d*).

(*a*) Rex v. Robins, 2 Str. 1069.

(*b*) Cowp. 502.

(*c*) Vid. Rex v. Bennet, Str. 101. Rex v. corporation of Brecknock, 8 Mod. 201.

(*d*) Vid. Rex v. Francis, 2 Term Rep. 484.

CHAP. V.

OF THE DISSOLUTION OF A CORPORATION, AND ITS EFFECTS.

THAT there is nothing in the nature of a corporation which renders it incapable of dissolution, is manifest from the definition and description which have been given of it in the introduction to this work (*a*): that it *may* be dissolved, is an idea familiar to the English law; and that this idea was not new in the reign of Edward the second, appears from the statute *de terris templariorum*, passed in the seventeenth year of that King.

THE order of Templars was erected by Pope Honorius, in the 21 H. 1 (*b*); the purpose of their incorporation was, that they might guide christian pilgrims to the Holy Land, of which the Saracens and Turks had taken possession: the members of the order never went there, but dispersed themselves in different parts of christendom: the end of the institution, therefore, not having been answered, the order was dissolved by Clement the fifth, in the 4 Ed. 2 (*c*), thirteen years before the statute above mentioned. The statute recites the dissolution of the corporation, and the fact, that the King and several lords had entered on all their lands and escheats. The judgment of the parliament was, that they were well dissolved, and, therefore, that the lords were well intitled by escheat, as the law stood; and by this statute the lands were settled on the hospitallers (*d*).

(*a*) Vid. vol. 1, 12—19. (*b*) An. 1120. (*c*) An. 1311.

(*d*) Vid. Sawyer's Ar. Quo War. 13.

THAT a corporation may be dissolved by act of parliament, is a consequence of the omnipotence of that body in all matters of political institution. But the King, though by his prerogative he can *create* a corporation, cannot by his prerogative dissolve it: for it is a principle of the law of England, that the King may grant privileges and immunities, but that when once vested, he cannot, by his *mere* prerogative, take them away (*a*).

WITH respect to sole corporations (*b*), there is no doubt but that the politic capacity may be separated from the natural person, by death, by resignation, or by deprivation for such offences as by the law are considered a sufficient cause of deprivation: but neither of these dissolves or destroys the corporate character; because the continuance of the latter is in the power of another. Between the death, deprivation, or resignation of one incumbent, and the appointment of another, the corporate capacity is indeed suspended; but immediately on the appointment of a successor it is revived, and exists to the same extent as before (*c*).

WITH respect to corporations aggregate, there are three ways, beside an act of parliament, by which, it is supposed, they may be dissolved. 1, A corporation aggregate is dissolved, when by accident it is rendered incapable of continuing its corporate succession. 2, It is supposed to be dissolved by the surrender of its franchises into the hands of the King: as it is 3, by forfeiture of its charter, through negligence or abuse of its franchises (*d*).

THAT a corporation aggregate is dissolved by the death of *all* its members, is a proposition so plain that it seems

(*a*) Admitted in *Rex v. Amery*, 365, 480.

(*b*) Vid. vol. 1, 19, 20.

(*c*) Vid. *Sawyer's Arg.* 21, 25.

(*d*) Vid. 1 Bl. Com. 485.

ludicrous to mention it, and yet an authority has been cited in support of it. Thus it is gravely adjudged, that if an abbot or prior and all the monks die, the corporation is dissolved, and cannot be revived without a new creation (*a*). So, if by the death or disfranchisement of so many of the members, that by the original constitution of the corporation, the remaining members cannot continue the succession, the corporate activity is gone, and to all purposes of action, at least, the corporation itself is dissolved: as, if a corporation aggregate consist of a definite number, and be reduced to half that number, so that there cannot be the concurrence of a majority of the original corporation, it can no longer continue the succession, and consequently, to many purposes, is dissolved (*b*).

BUT while the surviving members have the power of continuing the succession, the corporation remains. Thus, it was held (*c*), that though all the monks died, yet if the abbot was alive, the corporation was not determined, because the abbot might profess others.

WHERE a corporation consists of several distinct integral parts (*d*), if one of these parts become extinct, whether by the death of the persons of whom it is composed, or by other means, the whole corporation, says Rolle (*e*), is dissolved: as if a corporation consist of so many brothers and so many sisters, and all the sisters die, the whole is dissolved, and all acts done, and all grants made by the brothers afterwards are void; because, says he, the brothers and sisters are integral parts of the corporation, *and it cannot subsist by halves*. But he adds, if the King make a corporation, consisting of twelve men, to continue for ever in succession,

(*a*) 20 H. 6, 7. Bro. Mortmain. 1 Inst. 13 b.

(*b*) Vid. vol. 1, 309—311, 400, et seq. (*c*) 11 Ed. 4, 4.

(*d*) Vid. vol. 1, 36, 37. (*e*) 1 Rol. Abr. 514.

and when one of them dies, that the rest may elect another in his place ; though three or four of them die, yet all acts done by the remaining members are valid, because the members deceased did not constitute a distinct integral part.

IN the famous case of the *quo warranto* against the city of London, Treby, the recorder, who argued for the city, and contended with all his ability, that a corporation could not be dissolved by the judgment of a court of law, yet admitted the authority of the case of the brothers and sisters, and the dissolution of the corporation, by the irremediable loss of an integral part (*a*).

SIR Robert Sawyer, in his argument for the crown, cites a case from the year books in the time of Edward 4 (*b*), from whence he concludes, "that where a commonalty have power to choose a mayor every year, but never choose one, they, by their own act, dissolve the corporation" (*c*) ; on the principle, no doubt, that the mayor is an integral part of the corporation, which consequently cannot subsist without him.

FROM this time till the case of the corporation of Bewdley, which occurred in the year 1712, it does not seem to have been disputed, that the destruction of an integral part of a corporation, where the power of renovation by the remaining parts had ceased, was a dissolution of the whole.

BY the report of this case (*d*), it appears that a charter had been granted to the borough by James the first, which was considered as a valid charter ; and another by James

(*a*) Treby's Arg. *Quo War.* 5.

(*b*) 21 Ed. 4, 14, vid. vol. 1, 312, 327.

(*c*) Sawyer's Arg. 21.

(*d*) *Regina v. Ballivos, &c. de Bewdley*, 1 P. W. 207.

the second, which was confessedly void. By the first of these charters, both the *capital* and *common* burgesses had a right to vote in the annual election of the bailiff, who was the chief officer; and the bailiff and *capital* burgesses were to do all corporate acts, and among others, to choose the *common* burgesses. After the grant of the charter of James the second, great confusion had arisen in the borough between two different sets of corporators, elected under the two different charters. In 1708 a new charter was granted by Queen Anne, which was accepted by the inhabitants, but refused by the remaining members of the old corporation. The bailiff who presided over the corporation when this new charter was granted, had been elected at a meeting at which a bailiff under the void charter of James the second presided, after its invalidity had been universally acknowledged: the new and old burgesses had voted promiscuously at that election; but a majority of the *old* burgesses had voted in favour of the person who was now bailiff. Disputes arising about the right of sending members to parliament, the commons petitioned the Queen to take proper steps for repealing the new charter, on which a *scire facias* was brought, and several issues being joined, a trial at bar was had. It appeared, that on the death or removal of any of the capital burgesses, the charter of James the first appointed that the *residue* of the capital burgesses, or the greater part of them, should choose others within fifteen days after the vacancy should take place; that for the last twenty-two years no vacancy had been filled up, and that, at the time when the charter of her Majesty was granted, there was only one capital burgess in being, qualified under the charter of James the first.— Three questions were raised, of which only the two latter are material to the present purpose. 1, Whether, according

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ing to the charter of James the first, the capital burgesſes were not to be conſidered as extinct, as one only remained; and if ſo, then 2, Whether, as by the charter the capital burgesſes were an integral part of the corporation, the latter could ſubſiſt without the former, or whether it muſt not, in defect of them, be diſſolved? If the capital burgesſes were ſtill to be conſidered as a ſubſiſting body; or if they were not, yet if the corporation, notwithstanding their extinction, was not to be conſidered as diſſolved, the charter of Queen Anne was void.

ALL the judges in court (*a*) ſeemed to think, that, if the capital burgesſes were no longer a ſubſiſting body, the legal effect was the diſſolution of the corporation; but one of them (*b*) doubted, whether under the clauſe that the remaining burgesſes ſhould elect others to fill up the vacancies, that might not be done by the only one who now remained?—The judges wiſhed the jury to find a *ſpecial* verdict, notwithstanding which they found a *general* verdict againſt the new charter. The court afterwards, by the advice of all the judges, granted a new trial; from whence it may be concluded that, on conſideration of all the facts proved, they were of opinion that the old corporation had loſt an integral part, and that the conſequence of ſuch loſs was the diſſolution of the corporation (*c*).

THE next caſe on this ſubject is that of the corporation of Banbury, which occurred in 1716. It was an information in the nature of quo warranto, exhibited againſt Mr. Painton, calling upon him to ſhew, by what authority he exerciſed the office of recorder of Banbury, when, the corporation having omitted to elect a mayor on the charter

(*a*) Parker, C. J. Powell and Eyre, J. (*b*) Powell, J.

(*c*) Vid. Mr. Eaſt's argument in Rex v. Paſmore, 3 Term Rep.

day, that integral part was gone. The court held that the defendant, though he had been chosen when the corporation was full, was not now legal recorder, because the corporation was dissolved: and Lord C. J. Parker said, "that if a mayor was not chosen on the day prescribed by the charter, and there was no provision for the old mayor's continuing till a new mayor was chosen, the corporation was dissolved, and consequently could not proceed to a new election; that if there could be no election *without* the old mayor, much less could there be one where there was *no* mayor. That this was not a forfeiture for non-user, but only a consequence in law: that he had never heard that a corporation could act without their head: if they could, they might avoid actions at their pleasure: that this corporation was dead, and not barely asleep; and that on the whole he was of opinion, it was actually dissolved, and that, therefore, the offices exercised were usurpations on the crown" (a).—In consequence of this decision a new charter was granted, under which the corporation now exists.

THE principle established in this case was recognized a few years after, in that of Tregony beforementioned (b), in which the court held that no election could be made but on the charter-day, and that where by their charter, the corporation have no power to choose on any other day, "their *corporation shall be dissolved* rather than they shall make an election on any other day" (c).

IN consequence of these decisions, several boroughs which had by accident or design been prevented from choosing a mayor on the charter day, applied to the crown for *new* charters; and among others the borough of Tiverton, in

(a) 10 Mod. 346. Vid. 3 Term Rep. 221.

(b) Vol. 1. 380, 381. (c) Vid. 8 Mod. 129.

the year 1724. The application was referred to the attorney and solicitor general (*a*), who, in their report, adverted to the case of Banbury, as conclusive that the corporation was dissolved, and also delivered it as their clear opinion, that the corporation could not be said to exist after the loss of an integral part, which was made necessary by its constitution (*b*).

THESE decisions gave rise to the statute of the 11 G. 1, c. 4, some part of which has been given in a former part of this work (*c*). The preamble of that statute plainly recognizes the opinion, "that by omitting to choose the mayor on the charter day, the corporation was dissolved," and therefore provides a remedy for this inconvenience (*d*). It is true, that Mr. Justice Aston, in the case of Colchester and Seaber, is reported to have said, "that the intent of this statute was not to consider such corporations as dissolved, and to grant them *new* powers, or, as it were, *new* charters as bodies dissolved; but to *revive their activity* and put them *again in motion*" (*e*): but with all the deference that is due to the opinion of so able a judge, it is difficult to conclude from the words of the statute, that the legislature did *not* consider the corporations as dissolved. They make an *express* provision by the 7th section, "that no corporation shall be deemed or adjudged to be dissolved or disabled from electing a mayor, bailiff or bailiffs, or other chief officer or officers, by reason of any omission or default which had already happened in not nominating, electing, or swearing any such chief officer, on the day or within the time limited by the charter or usage, or by rea-

(*a*) Sir Philip Yorke and Sir Clement Wearg.

(*b*) 3 Term Rep. 222.

(*c*) Vol. 2, 31, et seq.

(*d*) Vid. vol. 2, 315.

(*e*) 3 Bur. 1873.

son of the absence of such chief officer, who ought to have presided at the assembly for such nomination, election, or swearing, or by reason of such election having become void as aforesaid; but every such corporation shall be deemed to have been subsisting and capable of electing such officer to all intents and purposes, notwithstanding any such omission, absence, default, or *avoidance*, or any defect, disability, or *forfeiture* arising therefrom." Had they not considered the corporations as dissolved, they would probably not have thought it necessary to make this provision: and by the next section they expressly recognize that opinion, by providing, "that nothing *herein* contained shall extend, or be construed to extend, to invalidate or make void any charter heretofore granted to and accepted by any city, borough, or town corporate, or any corporation within the same, or any of them, or any elections or acts had, made, or done in pursuance of any such charter; nor to make good the election of any officer or member, or of any person claiming to be an officer or member of any city, borough, or corporation, against whom any judgment of ouster shall have been entered or given, in any information in the nature of quo warranto, or whose election shall have been avoided on any writ of mandamus on or before the last day of Michaelmas term, in the year 1724."

THIS statute does not affect the legal consequences of the extinction of any *other* integral part of a corporation, or of its reduction to so small a number that the succession according to its original constitution cannot be continued. The fifth section expressly excludes the idea of any intention to make any alteration in the common law in these respects: it provides, "that no election, nor any act done
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in order thereto, shall be valid, unless as great a number of persons having right to be present at, and vote therein, shall be present at the assembly holden for such purpose, and concur therein, as would respectively have been necessary to be present, and concur in such election or act, in case the same had been made or done on the day, or within the time appointed by the charter or usage" (a).

THAT this statute has not been in general considered as making an alteration in the common law in any other case than that of the *chief* officer of a corporation, is manifest from the cases cited in that part of this work which treats "of the concurrence required in corporate acts" (b); and there are other cases not mentioned there, which not only confirm this observation, but recognize the law as before stated (c).

THE town of Maidstone had been incorporated by a charter of James I, by the name of Mayor, Jurats, and Commonalty. The mayor was to be elected out of the jurats by their naming two, of whom the commonalty were to choose one: the jurats by the mayor, jurats and commonalty out of the inhabitants: the freemen by the mayor and jurats. In 1742, there being then no mayor or legal jurat existing, application was made for a new charter: there were upwards of five hundred freemen, of whom two hundred opposed the application. The matter was referred to Sir Dudley Rider and Sir John Strange, attorney and solicitor general, who, stating these facts in their report, delivered their opinion, that the corporation was *dissolved* (d). In consequence of this opinion, after much litigation, a new charter was granted, under which the corporation have acted ever since (e).

(a) Vid. ante, p. 33.

(b) Vid. vol. 1, 400, et seq.

(c) Vid. p. 448.

(d) 3 Term Rep. 225.

(e) Vid. 3 Bur. 1827. 4 Bur. 2204. Vid. vol. 2, 29, 30, 113.

It is true, that in the case of Colchester and Seaber (*a*), some expressions are used by the judges, which seem to imply a doubt about the propriety of this opinion, "that a corporation is dissolved by the destruction of one of its integral parts," and these expressions have been cited as an authority to impeach it: but they have been decided to be either ill-founded, or inapplicable to this question. The case occurred in the year 1766. It appeared that in 1740, there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the corporation: that those persons were all dead before the year 1763: that from 1740 to 1763, no person, in fact, took upon himself to be, or claimed to be mayor or aldermen; and that in 1763 the charter, under which they acted when this case occurred, was granted and accepted. The question immediately before the court was, whether the *present* corporation could maintain an action on a bond given to the corporation in the year 1735? This was considered as depending on another question, whether the *old* corporation was *dissolved* at the time of the acceptance of the new charter in 1763.

LORD Mansfield expressed himself to this effect: "Many corporations, for want of legal magistrates, have lost their activity and obtained new charters. Maidstone, Radnor, Carmarthen, and many more are in the same situation with Colchester. And yet it has never been disputed, but that the new charters *revive* and *give activity* to the old corporation.—Where the question has arisen on any remarkable metamorphosis, it has always been determined, that they remain the same, as to *debts* and *rights*. It now comes on, as a question, whether the old corporation exists, after this judgment of ouster against the mayor and all

(*a*) 3 Bur. 1866.

the aldermen, and after the new charter? and it is argued, that this new corporation is totally *distinct* from the old one. But there is no authority, no *dictum* for it: and the consequences are obvious, and would be most inconvenient. Without an *express* authority so strong as not to be gotten over, we ought not to determine a case so much against reason, as that the parliament should be obliged to interfere to set it right.

“THE corporation is *not dissolved* by the judgments of ouster and subsequent deaths of the mayor and aldermen, though they are without their magistracy: Their *constitution* is not destroyed and gone. Their former *rights* remain. Would not a freeman of Colchester still continue to have a right of *common*? or to vote for members to parliament?—Notwithstanding this judgment of ouster, a *right* may remain, so as to be capable of being again *raised* and *revived*. The corporation cannot *act* without legal magistrates: but their *rights* may be *revived*, and put in *action* again, by a new charter from the crown, giving them legal magistrates. I am clear upon principles of law, that the *old* corporation was *not* absolutely dissolved and annihilated, though they had lost their magistrates; and that by virtue of the new charter they are *so* revived as to be *entitled to the credits*, and *liable to the debts* of the old corporation. Where there is a judgment against the *corporation itself* the case may be of a different consideration.”

MR. J. WILMOT expressed himself thus:—“Wherever a corporation accepts a new charter, it *remains*, to every intent and purpose, as it did before, though the name be altered.——Then the law being clear, that a new charter does *not* destroy the rights of the old corporation; the question is, whether this corporation was dissolved by the judgment of ouster against individuals?—
clearly

clearly it is not. The difference is between a judgment against the *corporation* itself, for that *may* be a forfeiture, and a judgment of ouster against individuals.——

Before the act of 11 G. 1, c. 4, which took its rise from a case of the corporation of Banbury, a corporation who had slipped the time of election of their chief officer could not proceed by their *own* power: but the *King* might have *given* them the power, by *reviving* and *reanimating* them. The corporation only lay *dormant* and *quiescent*, till *revived* and *restored* to their activity."

MR. J. YATES concurred in the opinion, "that the corporation could not be dissolved by a judgment against *individuals*,"—and Mr. J. Aston expressed himself as before mentioned with respect to the statute 11 G. 1, c. 4 (a).

WHATEVER doubts this case may have raised on the subject, it has been since finally settled in the case of the King and Pasmore, "that when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved that the crown may grant a new charter to a different set of men."

THIS was an information in the nature of quo warranto, which called upon the defendant to shew by what authority he claimed and exercised the office of mayor of the borough of Helstone. He set forth a title under a charter of George the third, the validity of which depended on the question, whether the old corporation of the borough under a charter of Queen Elizabeth, was, at the time of the granting and acceptance of the former, dissolved?——It appeared, that by the charter of Elizabeth the corporation consisted of five aldermen, who were to continue for life, and of whom one was to be mayor, and of thirty-one

(a) Vid. ante, p. 453.

burgesses, the mode of choosing whom it is not material to the present purpose to state. The mode of choosing the mayor was this: the mayor and the major part of the aldermen were to meet in the Guildhall on the Sunday next before Michaelmas, in every year, and then and there nominate *two* of the aldermen before the freemen or burgesses then and there present, who were to elect one of those two so nominated to be mayor for one whole year, and until another should be chosen to the office in the same manner. It appeared, that by judgments of ouster, in informations in the nature of quo warranto against several persons for acting as mayor, aldermen, and freemen, and by the natural deaths of others, the corporation, at the time of the granting and acceptance of the charter of George the third, was reduced to *one* alderman and *seven* burgesses: it appeared further, that this charter was directed to the *inhabitants* of the borough, all of whom, *except these eight*, accepted it.

AGAINST the title of the defendant, it was contended, principally on the authority of the case of Colchester and Seaber, that the *old* corporation was not *dissolved*, and consequently that the new charter was void.

THE council for the defendant, after a very elaborate argument on the nature of the case, which he supported by the authorities which have been mentioned in the course of this chapter, answered the objection arising from the case of Colchester and Seaber in this manner: 'That Lord Mansfield began by observing, "That many corporations, for want of legal magistrates, had lost their activity and *obtained* new charters;" that the very outset, therefore, of his description of the case marked it to be essentially different from the present, where the *old* corporation had not obtained a new charter; that the examples which he brought into
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comparison with Colchester, were of corporations, which, after having been declared to be dissolved by the ablest opinions which could be taken in the course of official duty, had received those new charters after every struggle which could be made against them. That his Lordship added, "it has never been disputed, but that the new charters *revive*, and give activity to the old corporations;" that all his reasoning, therefore, applied to cases, where *restoring* charters had been granted to the *old* body, and not to those of charters of creation granted to a new set of men; that the very term *revive* implied, that they had given new life to that which once had existed but had ceased to exist: that this was put beyond all doubt, by the words of his Lordship which immediately followed: "It now comes on as a question, whether the old corporation exists after this judgment of ouster against the mayor and all the aldermen, and after the new charter; and it is argued that this *new* corporation is totally *distinct* from the *old* one. But there is *no authority, no dictum* for it:" that his Lordship did not try the existence of the old corporation upon their situation *before* the new charter, but *after* it: whereas, in order to make that case apply to the present, the new charter ought not to have been granted to the old corporation; "that there was no authority, no dictum, in support of the argument against the existence of the same corporation as it was before," might, therefore, be true, as applied to the case before his Lordship, where the crown had restored the old corporation by a new charter; but applied to the state in which they were *before* that grant was utterly unfounded, and repugnant to the legal knowledge of that great judge: that it was so far from being founded in fact, that every antecedent authority and dictum were strongly in support of the affirmative of the proposition; that some of these au-
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thorities too were not obsolete, but were cases which had made considerable noise at the time, and had been recently canvassed: that it was absolutely impossible to suppose that all these had been overlooked or intended to be suppressed in silence, as Mr. J. Wilmot expressly mentioned the case of Banbury, which was not questioned, much less denied to be law either by him or the rest of the court. That, to the observation of Lord Mansfield, "that without an express authority so strong as not to be gotten over, the court ought not to determine a case so much against reason, as that the parliament should be obliged to interfere to set it right;" it might be answered, that there were *several* authorities too strong to be gotten over; and that as to the interference of parliament, they had had this very case before them, and had not only declined to interfere, but had expressly provided against the interference of the courts by implication from the general provisions of the statute (a). It was true that Lord Mansfield observed, "that the corporation was *not* dissolved by the judgments of ouster and subsequent deaths of the mayor and aldermen, though they were without their magistracy; that their constitution was not destroyed; that their former rights remained:" and then asked, "whether a freeman of Colchester would not still continue to have a right to common; or to vote for members to parliament?" It was not contended that judgments of ouster against individuals, would, merely as such, dissolve a corporation; but that if by means of such judgments, or by any other means whatever, a corporation was deprived of an integral part, and had no power of replacing it, *by consequence of law* it was dissolved: but after what had been said by his Lordship be-

(a) Vid. ante, p. 453.

fore, all these expressions must be understood with limitation, and applicable only to the case then before him : for that otherwise the argument would go the whole length of saying that, though judgment of ouster had been obtained against *all* the CORPORATORS, yet the constitution would still subsist so as to preclude the King's grant.—With respect to the rights of common and of voting, which might remain to the individual members after the destruction of their corporate activity, it had never yet been determined that any such rights would survive the wreck of the corporation : it was true that Lord Holt, in the case of *Ashby and White* (a), said, that some of the privileges of a corporation, and among others, that of voting and the right of common, were to be exercised by the members individually for their separate benefit ; but he was speaking of a corporation in the full exercise of all its functions ; he did not say, that the right remained after the extinction of the corporate capacity ; on the contrary he said, that it was agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it redound to the individual members : from whence it was rather to be inferred that his opinion was, that the individual members had no rights except as members of the corporation aggregate. Perhaps what was said by Lord Mansfield might be reconciled with the authorities cited, by saying, that the old corporators might exercise these collateral personal privileges concurrently with the members of the new corporation ; but in this case it was unnecessary to discuss that question, if it appeared, as it most clearly did from the authorities cited, that the King had a right, by the dissolution of the old corporation, to grant all their corporate franchises to another set of

(a) 2 Ld. Raym. 952.

men.—All the remaining expressions of Lord Mansfield and the rest of the court, could in general be applied only to such a case as was then before them, where the *old* corporation had been *revived* and *restored* by a new charter, which was further confirmed from this, that by the report of the same case in Blackstone (*a*), Lord Mansfield is made to say, that it frequently has happened that by judgments of ouster against persons illegally elected no regular election can again be had; and the corporation is commonly said to be thereby *dissolved*: but till this case it was never doubted but that by a new charter it was revived.” Thus far,” continued the counsel for the defendant, ‘the intention and opinion of the judges who gave judgment in the case of Colchester and Seaber, have been considered, and endeavoured to be collected from the internal evidence afforded by the case itself. In order to make that case apply against this defendant, it is necessary for the other side to shew that the abstract doctrine intended to be laid down by the judges was, that the loss of an integral part of a corporation made necessary to its corporate activity by the terms of its constitution, without any power of replacing it, was not a dissolution. But beside, that the facts of that case did not call for such an opinion, and that such is not the natural inference to be drawn from the expressions used by the court taken altogether, and connected with each other, the very same judges in subsequent cases (*b*), and in one particularly, very recently afterwards, delivered a contrary opinion; in a case too arising out of the same borough of Colchester, and growing out of the former judgment. By a statute of W. 3 (*c*), a corporation had been created, consisting of the mayor and alder-

(*a*) 1 Bl. Rep. 59.

(*b*) Vid. vol. 1, 404—410, vol. 2, 14.

(*c*) 9 and 10 W. 3.

men of Colchester for the time being, and of forty-eight other persons, to be guardians of the poor of the said town. The latter were to be chosen at once, twelve out of each of the four wards; and six of each twelve, who were first elected, were to cease to be of the corporation at the end of two years, and six others to be chosen in their room, at a meeting to be holden *by the mayor and aldermen* for that purpose: in consequence of the judgments of ouster obtained against the mayor and aldermen, by which those offices had ceased in the corporation, the election of the guardians could not be continued; neither could the remaining guardians hold any meetings for the dispatch of business without the mayor and aldermen by the provisions of the act: at the time of the *revival* of the old corporation by the new charter, none of the forty-eight guardians remained: an application was, therefore, made to the court of King's Bench for a mandamus to the mayor and aldermen, commanding them to proceed to an election of forty-eight persons, duly qualified according to the statute, to be guardians of the poor. The court were of opinion, that they could not grant a mandamus for a whole integral part; and that the corporation which was to consist of two, *by the dissolution of one of these was itself dissolved*.—It is absolutely impossible that the same judges who used the expressions attributed to them in this case, could have just before held sentiments so diametrically opposite to them, as those which have been imputed to them in that of Colchester and Seaber. This rather shews that what was there said by them, was said only in reference to the particular case then before them: but if it had been otherwise intended at the time, yet, as they held a contrary language in a case immediately subsequent, and that too with an express reference to the former, it is most natural

tural to suppose that they had reconsidered their former opinion, and thought proper to correct it' (*a*).

THE court adopted the reasoning of the defendant's counsel, and expressed their opinion in direct terms, that whenever by any means a corporation was deprived of an integral part, or was so far reduced as to be incapable of acting or of continuing itself, it is so far dissolved, that the King may grant a new charter to a new set of men, although, instead of that, he may revive the old body by a charter of restoration (*b*).

THE next mode, by which it is supposed a corporation may be dissolved, is by surrender; which, however, must be enrolled, because the King can take nothing but by matter of record (*c*), and a deed is not of record without enrollment.

THAT a corporation may surrender any of its possessions or subordinate franchises, as well as an individual may, where it is not prohibited by some positive law, seems never to have been doubted: but its power of surrendering its corporate existence has been much disputed. The question seems to have been agitated, for the first time with any degree of earnestness, in the case of the quo warranto against the city of London, in the time of Charles the second, when the counsel for the city thought it of importance to their cause, to contend, that a corporation could not be dissolved by surrender, or, in other words, that it could not surrender its corporate existence. The same doctrine was maintained in the case of the King and Amery, by the counsel for the relator. In the nature of the thing, there does not seem to be much metaphysical difficulty: that a corpo-

(*a*) Rex v. mayor and aldermen of Colchester, 3 Term Rep. 234, 5.

(*b*) Rex v. John Pasmore, 3 Term Rep. 199—250.

(*c*) Salk. 191.

ration may, in point of fact, destroy itself, by its own act seems as easy to be comprehended as that a natural person may put an end to his life by his own hands. The acting part of the corporation put the common seal to a deed of surrender; carry up all their charters to St. James's, and lay them at the King's feet; procure the surrender to be enrolled, and desert all their corporate functions: must not the consequence be, that in a little time the corporate existence must be at an end?—Whether such a surrender shall be *permitted* by the law is a matter of mere political consideration; and the negative does not seem to have been established by the law of England. If it were, it would, notwithstanding, be impossible to prevent the natural effect of such a surrender *actually* made. It would no doubt be a breach of trust in the *acting* part of the corporation to make such a surrender without the authority of the major part of all the individual members; but unless the latter had, by the original constitution of the corporation, the power of supplying the place of the former by an election from among themselves, I do not see how the effect of a complete destruction of the corporate existence could be prevented. As the *right* of acting as a corporation is a franchise existing collectively in all the individuals of whom the corporation is composed (*a*); there is certainly no objection to all those *individuals* surrendering that right.

FEW cases have occurred on this subject, and in those that have, it does not seem to have been doubted but that the corporate existence *might* be surrendered: the question has in general turned on the *terms* of the surrender, and the extent of their signification.

(*a*) Vid. vol. 1, 14.

It is true that Sir George Treby, in his argument in the case of the quo warranto against the city of London (*a*), argues, from the statutes which were passed in the time of Henry the eighth, vesting the surrendered monastries in the King, that it must have been considered as doubtful whether they were vested in him by the surrenders alone : but his own manner of stating the case shews, that the doubt was not whether the monastries *could* be dissolved by *any* surrender, but whether the terms of the surrenders actually made were sufficient for that purpose.

THE rule adopted in all the cases which have occurred on this question seems to have been this : that when the effect of the surrender is to destroy the end for which the corporation or the corporate capacity was instituted, the corporation or the corporate capacity is itself destroyed. Thus, says Lord Coke (*b*), on the authority of the book of assize (*c*), if there be a warden of a chapel, and the chapel and all the possessions be aliened, he ceases to be a corporation, because he cannot be warden of nothing. But if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary by title paramount, yet his corporate capacity remains, because he has *stallum in choro et vocem in capitulo*, and he is prebendary although he have no possessions. So, where it is held that if an abbot or prior and convent sold all their possessions, yet the corporation remained, "this," says he, "without question, is good law, *if they were the chapter to a bishop* : " from whence it is evident his opinion was, that if they were *not* the chapter to a bishop, the alienation of all their possessions was the dissolution of the corporation : and the reason of the distinction between the two cases is this ; that where an abbot and convent were the chapter to a bishop,

(*a*) Vid. vol. 1, 9, 10.

(*b*) 3 Co. 75, a.

(*c*) 15 Aff. 8.

that was considered as the great purpose of their institution, which was not affected by the alienation of their possessions : but where they were not the chapter to a bishop, the only end of their institution was to enjoy property in a corporate capacity, and when the former was gone, the latter was at an end.

THE two great cases on which the advocates for the indissolubility of a corporation by surrender principally rely, are the case of the dean and chapter of Norwich, in the 40 and 41 El. reported in Coke and Anderson (*a*), and Hayward and Fulcher, in Palmer and Sir William Jones (*b*), in the 3 Car. 1.

THE circumstances of the case of the dean and chapter of Norwich were these : Henry the eighth, by virtue of his authority as supreme head of the church, translated the prior and convent of Norwich into dean and prebendaries, by the name of Dean and Chapter of the Cathedral Church of the Holy Trinity of Norwich, and made them the chapter to the bishop and his successors. The dean and chapter, by their deed enrolled, surrendered to Ed. 6, in the second year of his reign, *their church and all their possessions*. These are the terms in which the surrender is stated in Coke and Anderson, and consequently the judgment must be considered as referring to these terms. The King in the same year incorporated the former dean and prebendaries of the former chapter, and six other persons (*c*), by the name of "the Dean and Chapter of the Cathedral Church of the Holy and undivided Trinity of Norwich, *of the foundation of King Ed. 6* ; and three days afterwards granted to them, by the name of "Dean and Chapter of the Cathedral Church of the Holy and undivided Trinity of Nor-

(*a*) 3 Co. 73. 2 Ander. 120, 165.

(*b*) Palm. 491. Sir W. Jones, 166.

(*c*) Palm. 491.

wich,"

wich," omitting the latter words, "of the foundation of Ed. 6," the church and all the possessions of the former dean and chapter, except certain manors. It having been made a question whether, on account of the omission in the name, this grant was good, the Queen referred the case to the lord keeper, the two chief justices, and the chief baron, who all concurred, "that notwithstanding the surrender of the church and all the possessions, the old dean and chapter remained."—The reason of this determination, as given in Coke and Anderson, is, "that so long as the bishopric remains, they, being the bishop's chapter and council, may well remain, although they have not any possessions, and shall be now as they were at the first, *without* any possessions."

In the case of Hayward and Fulcher, which arose on a question concerning a lease made by the same dean and chapter, the surrender is stated in fuller terms, to have been "of all their possessions, rights, liberties, privileges, and hereditaments, which they had in right of their corporation." On the question, whether by this surrender the corporation was extinct, the judges, according to the report in Jones (*a*), resolved unanimously that it was not; "because a corporation in *general*, and so a dean and chapter in *particular*, may be at the beginning without any lands or possessions annexed to them, and may take their denomination from a place, though they have nothing in it; and as at the beginning a corporation may be without lands, so though they grant *all* their possessions, yet the corporation continues, and in particular, though dean and chapter surrender all their possessions, yet the corporation continues, and they continue the chapter to the bishop, and notwithstanding they surrender their church, yet the

(*a*) Sir W. Jones, 166.

corporation continues.”—And the reporter goes on to say, “and per Dodridge, the dean and chapter, insomuch as they are the council of the bishop, cannot surrender their corporation; but this does not appear to *me* to be law, for a corporation of dean and chapter, though it be spiritual in one respect, inasmuch as they, by the canons of the church, are to give advice, and be of council with the bishop, yet they are a corporation, and enabled to sue or be sued, and to purchase or alien, by our law, to wit, by prescription, grant of the King, or act of parliament; and in this respect, they may well dissolve that corporation by a proper act, to wit, by resignation of all their goods, or by the death of all the corporation, and the King was patron, and it is in his election whether he will collate anew or not, for till he has collated the corporation shall be suspended” (a).

In the other report of the case (b), Whitlock, and not Dodridge, is represented as saying, “if the dean and chapter may be dissolved by grant, they are, as it were, *felo de se*, which is against nature.” But as to this, continues the reporter, Jones said, “dean and chapter may dissolve themselves;” but he concluded with Whitlock, that *here* they are not dissolved.

It may be observed, that the reason given by Dodridge is applicable to no *other* corporation but dean and chapter; and that the decision of the court in this case, as well as in that of the dean and chapter of Norwich, was founded not on an opinion that the corporate existence could not be surrendered, but that the terms of the deed were not sufficient to produce that effect.

(a) The language of the reporter is not very correct, but I have given a literal translation, that the reader may draw his own conclusion from the case. (b) Palm. 501.

THESE two, however, are the cases which have been relied on as the strongest judicial authorities, “that the franchise of *being* a corporation” cannot be surrendered: and Treby, after citing them with some triumph, proceeds thus:—

“There is a case in Dyer (*a*), which seems the only case against us on this point: there were two deans and chapters, one of St. Patrick’s, and the other of Christ Church, in Dublin; both these, and not one of them only, were together one chapter to the archbishop of Dublin: one of these surrendered, and their house was used as a place for the courts of justice; then a lease was made by the bishop, confirmed by the remaining dean and chapter, which was that of Christchurch: and whether that lease was good or not, was the question (*b*): and truly that was the only question made in that book, and so ’tis of little authority as to any thing else: but ’tis true that that book *does* say in the end of the case, that the lease was held good, “*quia corporatio et capitulum Sancti Patricii prædicti fuit per donum et sursum redditionem decani et capituli prædicti legitime dissolutum et terminatum.*” “To this I answer,”

“FIRST, there was no occasion for this reason, because it did digress from the main point of the case.”

“SECONDLY, it was a private extra-judicial opinion; it was the opinion of but five judges, and for ought appears, seven might be of *another* opinion, and yet the case was sent for the opinion of *all* the judges here, because the lawyers in Ireland, it seems, did make a great doubt of it. And it was also an opinion and judgment of the favourable side, for it was to confirm a predecessor’s lease. But,”

“THIRDLY, Certainly the case is mistaken, for the surrender could not be good without the consent of the

(*a*) Dyer, 282. Treby’s Arg. 11.

(*b*) Vid. this case, vol. 1, p. 113, n.

bishop, which is also added in the end of the case ; he is the patron, and must necessarily confirm their acts to make them valid, especially they being instituted and given to him for his advice in the government of the church and the disposal of its lands."

"FOURTHLY, I have this further answer, that my Lord Coke says (*a*), and 'tis not denied, that this surrender was by act of parliament, or else it had not been good. And beyond that,"

"FIFTHLY, I have by me a manuscript of my Lord Dyer's reports, the most authentic one, which was my Lord Coke's, and has his own hand to it in sundry places ; and by that he does often correct the prints of Dyer, and so also he might have done in this case ; for there all these latin words are left out, there is not one of them, nor any space left to put them in, nor any blot for their being razed out ; it is an addition of the publisher, and printed in another letter than the rest of the case is ; 'tis not in that book which I take to be the truest original of Dyer ; besides, my Lord Coke's answer, that it was by act of parliament, makes an end of all."

THE only remaining case on this subject is that of the King and Grey, which occurred in 1726 (*b*).—It appeared that in the 15 Car. 2, a charter of incorporation was granted to the borough of Colchester, in which a power was given to make justices of the peace for the said borough, who should hold their sessions there ; with a clause excluding the justices of the county from any jurisdiction within the borough. In 36 Car. 2, this *charter* was surrendered, and in the deed of surrender was a clause, by which the *corporation* gave up all the liberties and privileges which they then enjoyed. By letters patent of King Wil-

(*a*) Leon. 234.

(*b*) Rex v. Grey, 8 Mod. 358.

liam and Queen Mary, all the lands and privileges of this corporation were granted, restored, and confirmed to them, in as large a manner as at any time they had enjoyed them before the surrender.

ON an indictment found at the quarter sessions held in Colchester for the county of Essex, and removed by certiorari into the King's Bench, the principal question related to the effect of the surrender and the letters patent of restoration.

ON one side it was contended, that the surrender was an absolute dissolution of the corporation, and that consequently the letters patent were void, as they supposed the existence of a corporation which did not in fact exist.

ON the other it was contended, that the corporation was not intirely dissolved, and that though, by the surrender, their lands and liberties had been given up, yet still they had a corporate capacity to take, and consequently the charter of William and Mary was good.

ONE judge held, that though barely by the surrender of the charter, the corporation was not dissolved, yet that its very being was destroyed by the words by which they gave up all the liberties and privileges which they enjoyed.

THE other three, on the authority of the doubts expressed in the case of the city of London, seemed inclined to the other side of the question; but as it was a matter of great moment, the case was adjourned; and it does not appear whether any judgment was ever given.

SUCH are the cases which, it has been contended, establish the principle, that a corporation cannot be destroyed by surrender and acceptance of the crown, and that it stands uncontradicted by any authority on the other side (a).

(a) Rex v. Amery, 258, 415.

THE last mode by which it is supposed a corporation may be dissolved, is by the judgment of a court of law, for a forfeiture of its corporate existence. This was the great question agitated in the case of the quo warranto against the city of London: in that contest the first legal abilities were engaged on both sides; and the utmost possible industry was used to collect, from every source of information, every thing which had the most distant relation to the question. In the only two cases (*a*) in which the subject appears to have been since investigated, *little* (*b*) more is to be found than a repetition of the arguments there urged, and of the authorities there produced: of what follows, therefore, the principal part cannot be expected to be more than a summary account of those arguments and authorities.

THE whole of what was said on both sides may be reduced to three distinct questions. 1, Whether, in the nature of the thing, the *being* of a corporation *can* be forfeited? 2, Whether the records of proceedings that have been adopted against corporations, prove an absolute forfeiture in point of fact? And, 3, admitting that the *being* of a corporation *may* be forfeited, what is the proper legal proceeding to carry the forfeiture into effect?

THE affirmative of the first question is founded on the general proposition, that to every franchise there is a condition tacitly annexed, the breach of which incurs a forfeiture of the franchise. That a corporation, in the character of a *political* person, may, as well as a *natural* person, by a breach of that condition, forfeit any of its subordinate franchises, was never doubted. In the present case the

(*a*) Sir James Smith's case, 4 Mod. 52. Skin. 310. 1 Show. 263. Carth. 217, and Rex v. Amery, 2 Term Rep. 515, and in a separate publication in 2 vols. quarto.

(*b*) The investigation of the effect of a judgment *quousque* in Rex v. Amery is new. Vid. post.

great question was, how far this principle should be applied to the *being* of a corporation.

SIR George Treby and Mr. Pollexfen, who argued for the city, supported the negative, by asserting that a corporation was not a franchise, and insisting on the invisibility, impeccability, and immortality attributed to it in the books of law (*a*); and Mr. Pollexfen (*b*) likewise insisted much on the political inconveniencies which must ensue from its being actually dissolved by forfeiture:—as there is no foundation for the invisibility, impeccability, and immortality of a corporation in the sense in which they apply the words (*c*), their argument, so far as it rests on these, is necessarily defective: with respect to political inconveniencies, however great they may be, they can affect a question in a court of law only where there is no other guide for its decision. The denial that a corporation is a franchise, arises from an inaccuracy in the mode of stating the proposition. “That it is a franchise in a corporation *to be* a corporation,” is certainly attended with as much metaphysical difficulty as, “that it is a franchise in a man *to be* a man:” but there is no difficulty in conceiving “that the *right* of acting as a corporation is a franchise in the individuals that compose it” (*d*). Sir Robert Sawyer, the attorney general, makes this idea the foundation of his argument on this part of the subject, and from thence shews the very *being* of a corporation may be forfeited; though perhaps it may be doubted, whether in his mode of deducing his conclusion, he be always logically correct.—Speaking of corporations sole, he says (*e*), “single bodies politic have indisputably such conditions annexed to them

(*a*) Treby's Arg. 3, 4. Pollexfen's Arg. 115.

(*b*) 111, 112, 113.

(*c*) Vid. vol. 1, 15—18, 71.

(*d*) Vid. vol. 1, 14.

(*e*) P. 21 of his Arg.

on the trust of their creation; and the breach of the condition is, in law, good cause of separating the politic person from the natural by deprivation, which, in the *civil* law, is of the same effect as judgment of *ouster* by the *common* law—and certainly the union between the politic and natural body is as close and as strong in sole as in aggregate corporations.—Yet not only treason and felony, but misdemeanors of far less consequence, committed by the natural person, will forfeit the corporate right, and amount to a breach of the condition annexed by law:—such small crimes as waste and wilful dilapidations, will be causes of forfeiture.”

It has been remarked (*a*), that, if this analogy between deprivation and judgment of ouster be just, it is clear that deprivation of the natural person in the case of corporations sole, and ecclesiastical corporations, does not at all affect the politic capacity; that the latter remains unaltered and unimpaired to be exercised and enjoyed by the next person who shall be put in possession of it; that in like manner, where judgment of ouster may be given against *particular* members, or even against *all* the members of a corporation, by which there is a separation between the natural persons who held the franchise, and the franchise itself; yet still the franchise itself exists: and that a judgment of ouster no more destroys the franchise of a corporation aggregate, than that of deprivation does that of a corporation sole.

BUT Sir Robert Sawyer himself, in another part of his argument (*b*), puts this matter in a different point of view; observing, “that if there be any advantage in point of duration, it inclines to the side of *sole* corporations, as bet-

(*a*) By Adair, serjeant, in *Rex v. Amery*, 261, 416.

(*b*) P. 25.

ter framed by policy to have continuance than *aggregate* corporations. 1, Because the choice of the successors, whether the corporation be elective, donative, or presentative, is placed elsewhere, and not in the person himself, so that it is not in his power to prevent the succession. 2, Because the law leaves it not in his power to determine the corporation, either by surrender or forfeiture, but during his life, and so he cannot prejudice the succession. But in lay corporations aggregate, the power of continuing the succession is trusted to the members, so that the whole right is in them, which they may determine either by *not* electing, or by electing those whom the law incapacitates: or every man may, for good cause, be disfranchised, or the franchise for cause may be seized, and consequently, for want of succession, fail."

REFERRING to the case of James Bagg (*a*), he says, "he takes it to be an express judgment in point, that there is a condition annexed by law to every corporation, and that the breach thereof is a forfeiture:" and observing that each individual member of an aggregate corporation may forfeit his right to be a member, by the commission of such crimes or offences as are there pointed out; from thence he draws this conclusion, that, as *every* member may forfeit that which *any* member may, the same acts which will forfeit the right of *every* member *separately* considered, if *done* jointly by *all* the members, will have the same effect, or, in other words, will be a forfeiture of the corporate existence of the whole corporation (*b*).

IN another part of his argument (*c*), in which he discusses the nature of the right to act as a corporation, and shews that it is a franchise vested in the individuals collec-

(*a*) Vid. ante, p. 50, 63, 64.

(*b*) P. 21, 22 of his Arg.

(*c*) P. 8.

tively taken, he draws this conclusion: "and therefore, when the question is of non-user or abuser of franchises by a corporation, it must of necessity be intended for some acts or negligence of the natural persons, or of those officers who were employed by them: and the question will rest only on this, *what* acts, or what omissions of the *natural* persons will affect this right, in which all the members have an interest." "But this question," says he, in another place (*a*), "what *acts* of the members, and of what *number* of the members will forfeit the whole franchise, I know no where distinctly put in our books, but as they lie scattered in the instances of forfeitures taken, and franchises seized; otherwise than upon the general rules of *non-user* and *abuser* of the trust committed to them. But the civilians," continues he, "treat largely on these questions; whether the cities, colleges, and universities may be forfeited and dissolved, and what acts of the members will be causes of such forfeitures." He then cites a passage from Oldradus de Ponte, which clearly proves this last position.

IN the case of the city of London two causes of forfeiture were alleged. 1, An oppressive bye law made by the common council for levying money, and the fact that money was actually levied under it on the subjects at large; and 2, a seditious petition to the King, drawn up by the authority of the common council, and printed and distributed throughout the kingdom by their order.—The counsel for the city contended strenuously, that the corporation at large were not, in this case, bound by the acts of the common council; and that if they were, yet the facts alleged were not sufficient causes of forfeiture.—On both these points, however, the judgment of the court was, de-

(a) P. 23.

cidedly against them, and certainly with good reason on the first, whatever may be said as to the last.

To shew that, in point of fact, corporations had often been forfeited, and that forfeiture enforced by judgment, the attorney and solicitor general, among others, produced the following examples.

IN 15 H. 3, the town of Hereford was seized into the King's hands by the sheriff of the county, for holding a market contrary to the King's prohibition. On certificate of this into chancery, a writ issued to the sheriff, commanding him to keep it in the King's hands, *donec dominus Rex aliud inde preceperit (a)*.

IN 3 Ed. 1, on an inquisition found of purprestures within the King's Warren of Dover, by stopping a water-course, by which the warren was overflowed, a writ issued from the court of Dover, to distrain the offender by his goods, to amend and remove the purpresture. The officer distrained the cattle of the offender, who lived at Sandwich, within the Cinque Port: some of the men of Sandwich made rescue, and when the constable of Dover sent messengers to complain of this to the mayor, and to require redress, several of the men of Sandwich attacked the messenger and severely beat him. The constable sent more officers to see right done, against whom the town was barricaded and chained, and who were kept out by the townsmen in a hostile manner. The constable went in person, and having after some time suppressed the tumult, the commonalty then submitted, and prayed he would deliver their submission to the King, which they produced under their common seal. This was accordingly delivered by the constable to the King in council, and the question was adjourned into parliament. The mayor, bailiffs, and com-

(a) Sawy. Arg. 18.

monalty were ordered to attend before the King and his council in Parliament on a certain day. On that day, in the presence of the mayor and bailiffs, who attended for the whole community, judgment was thus entered on record.

CONSIDERATUM fuit per dominum Regem et concilium suum in parlamento, quod *majoritas et libertas* de Sandwich pro prædict. transgressionibus, in manus domini Regis capiatur, et tradatur in custodiam constabulario de Dover ad disponendum de prædict. villa secundum communem legem et consuetudinem regni, non obstante aliquâ libertate.

“ BOTH from the form and matter of this entry,” says Sir Robert Sawyer (a), “ it is evident that this decision was *judicial* and not *legislative* ——— here is a judgment only of seizure on a *forfeiture*; yet it amounted to a real ouster; for the town was actually divested of its liberty, and delivered up to the government of the common law.”

AMONG the rolls of 9 Ed. 1, there is the record of an information at the King's suit, presented by the sheriff of the county, against the mayor of Sandwich and three others, for assaulting the sheriff's bailiff on execution of the King's writ within Stanore, beating the officer, taking the writ from him and tearing it, and stamping it under their feet. They plead to the jurisdiction, that Stanore was within the liberty of Sandwich, within the Cinque Ports, and that they are not bound to answer elsewhere than at the court at Shepway. The plea was overruled; they insisted on their exemption, and refused to give any further answer, on which judgment was given that they should be committed to prison: “ et quia Johannes Dennis, major de Sandwich, convictus est de transgressionibus prædictis; et

(a) Arg. 28.

factum majoratus in his quæ tangunt comitatum est factum ipsius communitat', consideratum est quod communitas de Sandwico amitt' libertatem suam."

"THIS," says Sir Robert Sawyer (a), "is an express judgment of the court of King's Bench, on the forfeiture of the liberty, for a crime committed by the mayor and others, in a matter relating to the whole *liberty*."

IN 33 Ed. 1, the liberty of the city of Winchester was seized into the King's hands, by judgment of the King and lords, for suffering a hostage to escape, who had been committed to their charge by the King for safe custody: a writ of seizure was directed to the sheriff of the county, quod prædict. civitat' Wintoniæ et libertatem ejusdem civitatis, cum omnibus ad eam tangentibus sine dilatione capiat in manum Regis, et eas salvo custodiat, *donec Rex aliud præceperit*. "Whereby," says Sir Robert Sawyer, "the franchise being seized, the men of the city were put under the government of the common law officer. The city afterwards compounded with the King for five hundred marks; and then the King restored to the same mayor and citizens the city and liberty aforesaid, to have and to hold in the form in which they had held them before the seizure of the same into the King's hands; and letters patent of restitution were granted, and a writ of restitution was directed to the sheriff.

EXAMPLES of the same kind are given by the attorney general, with respect to Ipswich, Norwich, Oxford, Evesham, and Southampton. The latter submitted to a fine, and raised their fee farm rent to 20l. per annum (b).

THE case of the town of Cambridge it may be proper to state more particularly, on account of the remarks made on it by both sides.

(a) Arg. 27.

(b) Sawyer's Arg. 29, 30.

LORD COKE states it to this effect (a): the mayor, bailiffs, and commonalty of Cambridge were accused, for that they in the late tumults and uproars confederated with divers other misdoers, broke open the treasury of the university of Cambridge, and took from thence and burned several charters, &c. of the university, and also compelled the chancellor and scholars, under their common seal, to release to the mayor and burgessees, all manner of liberties, and also all actions real and personal, and further to be bound to them in great sums of money. Whereupon it was agreed in form following: that one writ should be directed to the mayor, bailiffs, and commonalty of Cambridge, that *then* were, to appear in parliament and answer; and another writ to the mayor and bailiffs that were *at the time of the offence*. The mayor and bailiffs that *then* were, appeared in proper person, and pleaded not guilty: the commonalty, by their attorney, appeared at the day.—Those who were mayor and bailiffs at the time of the offence appeared also in proper person, and the mayor answered that he was not privy to any such act, but only by compulsion of others. The burgessees of Cambridge delivered into the parliament two deeds sealed by the chancellor and scholars; one of which contained a release of all liberties and privileges, with a bond of 3000l. to release all suits against the burgessees; and the other was a release of all actions real and personal.—These were ordered to be cancelled.—The chancellor and scholars, by way of petition and in form of articles exhibited, gave a history of the whole transaction: on the reading of this, it was demanded of the burgessees what they could say why their liberties, lately confirmed by the King, should not be seized into the King's hands as forfeited.

(a) 4 Inst. 228.

THEY required three things. 1, A copy of the bill. 2, Counsel. And 3, Respite to answer. To the first it was answered, that since they had heard the bill, that was sufficient, for that, by law, they ought not to have a copy. To the second it was answered, that they were then appointed to answer to no crime or offence, but only touching their liberties. After many dilatory shifts and subterfuges, the said burgesſes having no colour of defence touching their liberties only, submitted themselves to the King's mercy and grace, saving their answers to all other matters. The King thereupon, *by common consent of parliament, and by authority of the ſame*, ſeized the ſame liberties into his hands as forfeited; and afterwards granted ſome of theſe liberties to the univerſity, and the remainder to the town, increaſing their fee farm.

IN the introduction to this caſe, Lord Coke refers to the rolls of parliament of 5 R. 2. but in a marginal note at the bottom he ſays, “Nota, by *aſt* of parliament. Vid. Rol. Parl. 8 R. 2, n. 11 ”

THE ſolicitor general having referred to this caſe as an authority that a corporation might be ſeized for a forfeiture, Sir George Treby takes advantage of the words, “by common conſent of parliament, and by authority of the ſame,” in the body of the caſe, and of this marginal note, to ſhew that ſuch a ſeizure could not be by the judgment of a *court of law* (a).

THE attorney general (b), in answer to Treby, ſays he is *miſled* by thoſe words and that marginal note, and ſuppoſes he had looked no farther than the 4 Inſt. taking it for granted that the record was that mentioned in the note, when in truth it was that mentioned in the introduction to the caſe. He ſays, that it appears by the record,

(a) Treby's Arg. 12.

(b) Sawy. Arg. 28.

that the judgment of forfeiture was not given by act of parliament, but by the King and his council *in parliament* sitting as a *judicial* court, which frequently happened in those times: he then states the case from the record in rather a different manner from Lord Coke: and his statement certainly shews that the judgment was that of a judicial court.

THE solicitor general (*a*) mentions a record by which it appears, that in the 15 Ed. 1. the franchise of the city of London was seized into the King's hands, and John de Briton, who was not a freeman, appointed *custos*, which, in the solicitor's opinion, implied that the very being of the corporation was forfeited to the King, "because," says he, "they had a power to choose *de seipsis*, by charter from King John, a citizen to be a mayor or chief governor, but here was another person appointed governor over them."

THE city continued in this state till the 26 Ed. 1, when the King, *pro bono servicio civitat' London' reddit eis civitat' suam London' habend dict' civibus ad volunt' Regis*: "so that," says the solicitor, "both the city and all its franchises were seized at that time, for he restored the *very* city of London to the citizens during his will and pleasure."

BOTH the solicitor (*b*) and the attorney (*c*) state several other records of similar seizures and restitutions, from the time of Ed. 1, to 20 R. 2.

MR. Pollexfen, in his argument for the city, contends, that none of these records prove that the *very being* of the corporation was seized for forfeiture; but that only some of the *subordinate franchises* were so seized: he takes particular notice of the record in the case of the mayor of Sandwich, and endeavours to shew that the liberty there adjudged to be seized, was not the being of the corpora-

(*a*) Finch's Arg. (*b*) Finch's Arg. 16. (*c*) Sawy. Arg. 37.
tion

tion of the town of Sandwich, but the liberty they had in Stannore, or the liberty they claimed to be impleaded in the court of Shepway (a):

WITH respect to those records which relate to the city of London, he says they are so far from proving that the *being* of the corporation was *forfeited*, that they shew it still *subsisted*; for that the seizure was a seizure only of the mayoralty, notwithstanding which the citizens exercised all their corporate rights, except that of choosing their own mayor; and he cites several records to shew, that during all the time of the custos, the courts were regularly held, particularly the court of hustings, and the court of aldermen, in which latter the custos sat in the room of the mayor (b).

HE contends likewise, and certainly not without reason (c), that admitting those records to shew the actual forfeiture of the corporations, they were not to be considered as authorities in a court of law: that they were proceedings in times of great trouble and confusion, and were not to be taken as precedents when law was better settled and understood. He observes, likewise (d), that in point of fact, notwithstanding all those seizures, the liberties were confirmed by several statutes from 1 H. 4, to 2 H. 6; and that from the time of R. 2, to this quo warranto against the city of London, there was not found any instance of a seizure of liberties or franchises, nor of a custos: he further observed, that notwithstanding the seizures which had actually taken place, London, Bristol, Gloucester, Cambridge, and the Cinque Ports, and he might have added others, in all their pleadings, entitled themselves to be corporations by prescription; which is a very strong argument

(a) Pollexfen's Arg. 100.

(b) Ibid. 101, 107, 108.

(c) Ibid. 103,

(d) Ibid. 104.

to shew that the effect of the seizures was not to destroy the corporate existence (*a*).

MR. Justice Blackstone, after stating, that one of the modes by which a corporation may be dissolved, is by forfeiture of its charter, through negligence or abuse of its franchises, adds, "that the regular course is to bring an information in nature of a writ of QUO WARRANTO, to inquire by what warrant the members *now* exercise their corporate power, having forfeited it by such and such proceedings" (*b*).

WERE this the *real* form of the information, a great deal of difficulty would be removed; but it must be recollected, that the *form* both of the original writ of quo warranto, and of the information in the nature of it, is the same whether the one or the other be brought for an usurpation without any original title, or for a subsequent forfeiture, when the original title is not disputed; that the first simply calls upon the defendant to shew by what warrant he claims the franchises in question, without alleging any usurpation or forfeiture; and that the latter expressly alleges an usurpation without any warrant or royal grant, and consequently does not state any subsequent forfeiture (*c*).

THOUGH the real intention of this proceeding may be, not to deny that an original title *once* existed, but to insist on its being now at an end by the misconduct of the defendant; yet, in general, the form will not involve any absurdity; because, though the plea shew a good *original* title, that is no more than a falsification, to a certain extent, of the allegation of the attorney general; who may, without inconsistency, reply, that notwithstanding the title pleaded, the defendant ought not to continue to exercise

(*a*) Ibid. 106.

(*b*) 1 Bl. Com. 485.

(*c*) Vid. ante, p. 395, 403, 404.

the franchise, because at such a time, previous to the commencement of the usurpation mentioned in the information, he did such and such acts, by which he has forfeited his right.

THESE observations apply equally to an information filed against an individual, or against a corporation by the corporate name, to enforce the forfeiture of any ordinary franchise: but the great question has been with respect to the name in which it shall be brought, when it is intended to enforce the forfeiture of the corporate existence, or, in the language of the case of the *quo warranto* against the city of London, “the franchise of *being* a corporation.”

WHERE it is intended to impeach the *original authority* of a number of persons to act as a corporation, the information ought most certainly to be, and in fact, has always been against the individuals, by their individual names, and not by the corporate name under which they act.

THE information against the city of London, by which it was not intended to impeach the original title, but to enforce a forfeiture of the corporate existence, was in these terms,—“that the mayor and commonalty and citizens of the city of London, for the space of one month now last past and more, had used, &c. without any warrant or royal grant within the city of London, &c. the several liberties, privileges, and franchises following, viz. to be of themselves one body corporate and politic, in deed, fact, and name, by the name of mayor and commonalty and citizens of the city of London, &c.”

THE city appeared by their attorney, and pleaded a perfect title; the attorney general replied, and assigned the two causes of forfeiture before mentioned (*a*): after some further pleadings, the case came before the court on demurrer; and among other questions agitated at the bar, this produced a considerable degree of discussion, “whether the informa-

(*a*) Ante, p. 478.

tion was well brought against the corporation, by the corporate name, or whether it ought not to have been brought against the individual members, by their proper names?"

THE great objection to this form of the information was this, that it at once admitted the defendants to be a corporation, and yet denied their authority to act in that character.

SIR George Treby not only argued fully on this apparent repugnancy, but asserted, that all the precedents that could be found were against this form: he said there never was but one instance of a *printed* precedent of a QUO WARRANTO, brought to impeach the being of a corporation, and that that was against the individuals by name; it was against Heldon and other burgesses of Helmesley, for usurping to be a corporation *by the name of the burgesses of Helmesley* (a): to strengthen the inference he drew from this, he cited several other instances of a similar kind, which were not in print (b).

THE attorney general contended, that these precedents, though they proved that the suit might be brought against the individuals by name, or against some particular members by name, and against the rest by words of general description, as *other freemen, other burgesses, &c.* yet they by no means proved, that the King had not a further election to bring his suit for questioning the corporation, either by the proper name of incorporation without naming particular persons, or by some other general name, which sufficiently described the defendants. That the suit might be so brought, he argued from the analogy of indictments against a parish, a hundred, or a county, for not repairing bridges, highways, &c. which might either be against some particular persons by name *and other inhabitants*, or against the inhabitants generally without naming any one in par-

(a) Co. Ent. 527. Treby's Arg. 26.

(b) Ibid. 27, 28.
ticular;

ticular; and he contended that there was no repugnancy in the present information; for that by being brought against the defendants, it was not admitted that they *were* a corporation, but that it was only intended to describe them by a name by which they were generally known (*a*).

It may be observed, however, that he failed in shewing a complete analogy between the two cases; because he did not prove that the right of being a parish, a hundred, or a county, was ever called in question by an indictment for not repairing a highway, &c.——And that part of his argument where he says the question will be, “what acts or what omissions of the *natural* persons will affect this right, wherein all the members of the body have an interest” (*b*), seems to be the strongest argument against the *form* of the information in question. It is in effect admitting that an information brought to destroy the corporate right for a forfeiture incurred ought to be against the individuals. It is a right exercised by them: it is a right forfeited by their act or omission: against them, therefore, according to his own reasoning, ought the suit to be brought.

BUT though there may be some degree of logical or metaphysical absurdity in an information brought in the form of that against the city of London, yet if, in point of fact, it were the acknowledged practice to bring informations in that form, the apparent repugnancy does not seem a good *legal* objection to them.

THE attorney general certainly produced several instances of such informations (*c*), but in all of them, except one, judgment appears to have been given against the defendants either for want of an appearance, or for want of an answer—That in which the defendants pleaded was the case of New Malton in the time of James the first.

(*a*) Sawy. Arg. 4, 5.

(*b*) Ibid. 8.

(*c*) Sawy. Arg. 6, 31.

“THIS

"THIS case," says the attorney (a), "is an express authority, that this liberty may be seized by judgment in a quo warranto against the inhabitants of a town by their corporate name. It is brought against the bailiffs and burgesses of New Malton, and the form of the information is the very same with this against the city of London."

"THEY plead by their corporate name, and entitle themselves to the liberty by prescription; after verdict, judgment is given against them by their corporate name, that the liberty be taken and seized into the King's hands; and which is more, the *capiantur pro fine* is entered against them by the corporate name of *Ballivi et Burgenses*, though the corporation by the seizure was dissolved; and the reason no doubt was, that that general name was a sufficient description of the persons who were liable to the fine for their usurpation."

MR. Pollexfen, in his argument for the city (b), acknowledges, that there are precedents in the crown office of QUO WARRANTOS brought against corporations in the same form as the present, for usurping *to be* a corporation, and for claiming several other liberties; and he mentions eleven from the 2 El. to the 8 Car. 1 inclusive, and says it is probable there may be more; but contends that if they be of any authority, they are *for* him, and not *against* him: 1, Because, being for claiming *other* liberties, as well as *to be* a corporation, and being good as to the former, though insufficient as to the latter, they must be proceeded upon, if the attorney general please. 2. In all of these, either a plea is put in, and confessed, or a *noli prosequi* is entered, and there is no judgment against the corporation, perhaps for this very reason, that as to the *being* a corporation, the in-

(a) Ibid. 31.

(b) Pollexfen. Arg. 68.

formations were insufficient. But if any could be found where the only usurpation charged, was that of claiming to be a corporation, or where, though *other* things were charged, that was the only thing for which judgment was given for the crown, then, he says, such a case would be like the present.——“One there is found,” he adds, “and that is the case of New Malton.” But, he says, there is no mention of it in any book or report as far as he could learn; so that it passed *sub silentio*; that he had made inquiry concerning this borough; that it was a small place within the manor of the ancestors of my Lord Eure; that it anciently sent members to parliament, but that from the time of Edward the first to the beginning of the long parliament in 1640, it had sent none; that on a petition, a writ was then ordered, and the inhabitants had ever since sent burgesses; that my Lord Eure, being lord of the manor, and offended with them, prosecuted this quo warranto, and they having neither lands, revenues, nor estates, to defend themselves, he easily prevailed, they having in truth never been incorporated, nor having any charter.

WHATEVER may be the proper *form* of an information of this kind, it must be filed in the name, and at the suit of the attorney general; for it is not within the meaning of the act of Queen Anne (*a*).

THE next point to be considered is the effect of the judgment against the defendants in the different stages of the proceeding.

It has been stated, that if the defendant to a writ of quo warranto did not appear on the first day of the Eyre, &c. judgment was given that the franchise should be seized into the King's hands in the name of a distress (*b*). Lord Coke,

(*a*) Rex v. corporation of Carmarthen, 2 Bur. 869.

(*b*) Vid. ante, p. 396.

in his comment on that part of the statute of Gloucester, which gives the *venire facias* commanding the sheriff to summon the defendant to appear on the fourth day, and, on his default, enacts, that it shall be done as in the circuit of the Eyre, says, that the consequence of the defendant's not coming to replevy the franchise during the sitting of the Eyre, was, that he lost it for ever; from whence he concludes, that after the proceedings in Eyre were discontinued, the same consequence followed from the defendant's not coming within the term to replevy in the King's Bench (*a*).—This opinion he founds, principally, on the authority of a case in the year books in the time of Ed. 4 (*b*), which, in consequence of his sanction, was, till the case of the King and Amery, considered as having established the law on this point.——If the consequence of not replevying within the term was in ordinary cases, the loss of the franchise for ever, it must, in the case of a quo warranto brought to enforce a forfeiture of the corporate existence, have been the dissolution of the corporation.

THE case of the King and Amery (*c*), was an information in the nature of quo warranto filed against the defendant for exercising the office of an alderman of the city of Chester. The defendant pleaded letters patent of Charles the second granted on the 4th of February, in the 37th year of his reign, by which the citizens and inhabitants of Chester were incorporated, and which was duly accepted; and then regularly deduced a title under it to the office of alderman.

THE prosecutor replied, that Charles the second did not grant; that the letters patent were not accepted; that the

(*a*) 2 Inst. 282. (*b*) 15 Ed. 4, 7, b. (*c*) 2 Term Rep. 515.

defendant

defendant was not duly elected, and that he was not admitted. The prosecutor then added two new replications; in the first of which he stated, that Charles the second by the same letters patent, mentioned in the defendant's plea, reserved to himself and his successors, a power of removing at their free will and pleasure, without any cause, by order in privy council made, and under the seal of the privy council, any *one or more* of the aldermen, &c. the order to be duly signified to the person or persons against whom it was made, and who, in consequence of such signification, should be to all intents and purposes actually amoved from their respective offices without further process; and directed that in *every such case other fit person or persons, within a convenient time after such amotion or amotions, should be chosen, sworn and appointed* into the office or offices of any such person or persons so amoved, in such manner as by the said letters patent was before directed. The replication then stated, that after the granting of the said letters patent, James the second, on the 12th of August 1688, in execution of the power reserved, by order in privy council duly made, removed *all* the persons who were then aldermen, &c. that this order was duly signified to them; by which the power as to the election of aldermen ceased, and was determined.

THE second replication stated a charter of incorporation granted to the citizens and commonalty of Chester, by Hen. 7, in the 21st year of his reign, which was duly accepted, and a charter of confirmation in the 16th of El. which was also accepted; that both these charters were in full force, before, and until, and at the time of the judgment therein after next mentioned. It then stated, that in Trinity Term, in the 35th year of the reign of Charles the second, Sir Robert Sawyer, then attorney general,

general, filed an information in the nature of quo warranto against the mayor and citizens, *by the name of mayor and citizens*, calling upon them to shew by what authority they claimed, among other things *to be in themselves one body politic and corporate*, by the name of mayor and citizens of the city of Chester.—It then stated, that such proceedings were thereupon had, that in Hilary Term 35 and 36 of Charles the second, *for default* of the said mayor and citizens in not appearing in the said court of the said Lord the late King, before the King himself, to answer to the said Lord the late King touching and concerning the premises, it was then and there by the same court of the said Lord the late King, before the King himself, considered that the liberties, privileges, and franchises, in the said information above specified, should be seized into the hands of the said Lord the late King, *until the said court should further order*.

· THIS replication then stated, that after this judgment, and after the charter of Charles the second, mentioned in the defendant's plea, James the second made an order of removal as stated in the first replication. It then further stated, that after this removal James granted a charter of restoration, dated October 26, 1688, by which he pardoned the judgment above mentioned, and restored to the mayor and citizens of the old corporation, their former liberties; that this charter was duly accepted, and that thereby the charter of Charles the second, in the defendant's plea mentioned, became void.

THE defendant rejoined, that the order in council for removal, &c. was not duly signified; and that such further proceedings were had in the information mentioned in the second replication, that in Trinity Term, in 36 Charles 2, judgment was given, that the liberties in the information

specified should be seized into the hands of the said Lord the King, and that the said mayor and citizens should be excluded and amoved therefrom; but that the record of this judgment was lost.

THE prosecutor, in his surrejoinder, denied that such final judgment had ever been given.

THE jury found by their verdict that Charles the second, by his charter, did grant as the defendant alleged in his plea; that the charter was accepted by the citizens and inhabitants; that the defendant was duly elected and admitted under the charter; that the order of removal was duly signified, and that there was no final judgment in the information.

IN consequence of this verdict, an application was made on behalf of the defendant, that the *postea* might be delivered to him, in order to enter up judgment upon it.

AFTER very able arguments on both sides, Mr. J. Ashhurst delivered the opinion of the court. After stating the pleadings, he said three questions arose upon them. 1. Whether Charles the second, at the time of granting the charter mentioned in the plea, had the power of creating a *new* corporation in the city of Chester. 2. Whether, if he had, the charter itself was a good one; and what was the effect of the amotion of all the members by James the second; and 3. What was the effect of the charter of restitution.

THE first question, he said, depended on the effect of the judgment for default of appearance, which clearly remained in force, when the charter was granted, under which the defendant claimed: and on the authority of the case 15 Ed. 4, supported by the sanction given to it by Lord Coke, he said, the court were clearly of opinion, that on the defendant's not coming in during the term in which the
venire

venire was returnable, or at most during the next term, and replevying his franchise, it was lost for ever ; and that therefore, as the defendants had not in the present case come in and replevied in time, the corporation was by the judgment *quousque* dissolved, and that consequently Charles the second had the power of creating a new corporation in the city of Chester.

ON the second question, he said, the court were of opinion, that the charter of Charles the second was good ; the objection to it had been, that it contained a power of removing *all* the members at the King's discretion, and was therefore void : but the true construction of that power of amotion was, that it must be confined to such a limited number, that the remaining members might be able to elect others according to the provisions in the former part of the charter : the amotion of *all* the members was therefore illegal and void. It followed from thence, that,

ON the third question, the court were of opinion that the charter of restitution was void ; for though it was competent to the crown to pardon a forfeiture, and to grant restitution, that could not be done where it would affect legal rights properly vested in other persons, which was the case here ; Charles the second, while the forfeiture existed, had incorporated a new body of men in the town, and invested them with new rights ; after which it was not in his power, and consequently not in the power of his successor, to defeat *their* interest by pardoning the old corporation ; and there could not exist in the same place two independent corporations with general powers of government.

ON this judgment, a writ of error was brought in the House of Lords ; and as the opinion of the court of King's Bench was professedly founded on the authority of the year book in the 15 Ed. 4, the counsel for the prosecutor pro-

cured a search to be made for the record of that case in the Crown Office; the only case of *QUO WARRANTO* which was found from Hilary the 14 Ed. 4, to Hilary the 15 Ed. 4, both inclusive, was, that of the King and Quadryng; and from all the circumstances, there is no doubt of this being the case in question.

By the controlment roll of the process in this cause, it appears, that in Michaelmas 14 Ed. 4, the sheriff of Lincolnshire was commanded to summon William Quadryng to be before the King himself, in the octaves of St. Hilary, to shew by what warrant he claimed to have a market every week on Saturday, at the town of Burgh, in le Merthe, in that county, without the licence of the King or his predecessors Kings of England: that on the day of the return of the writ, the sheriff returned, that he had summoned the defendant; that because the court was not advised concerning the process which ought to be further made, a day was given to the attorney general and the defendant, until in fifteen days from the day of Easter; that on that day the defendant not appearing, a writ of *venire facias* was awarded to answer on the octave of Trinity; then an *alias venire facias*; then a writ of *distringas*, which was continued from term to term, by *alias* and *pluries*, till the end of the reign of Edward the fourth; and that in the first of Richard the third, a new writ of *venire facias* was awarded, which was renewed from term to term till Mich. 2 R. 3, when the sheriff returned, that the defendant was dead.

By the controlment roll of the judgment, it appears, that on the default of the defendant in Trinity 15 Ed. 4, a day was given to the parties to the octave of St. Michael, to hear the judgment of the court; at which day judgment is given, *that the market aforesaid be taken and seized into the*

hands of our Lord the King, quousque, &c. The sheriff is commanded to seize the market *according to the form of the judgment aforesaid, &c.* and to shew in the octave of Hilary how he should have executed the writ; at which day he returns that by virtue of the writ to him directed, he had seized the market into the hands of the Lord the King, *according to the form of the aforesaid writ.*

THE entry roll states the proceedings of the court at more length, agreeing in substance with the roll of the judgment, and concluding with the sheriff's return to the writ of seizure *quousque (a).*

THE report of the case in the year-book is in these terms :

“THE King brought his writ of *quo warranto* against a man to shew *quo warranto* he claimed to have a market in C. in prejudicium, &c. The writ returnable of *Easter Term* last past, at which day the defendant did not appear, on which there issued a *venire facias* against the same defendant, returnable in *Trinity Term*, at which time also the defendant did not appear. And now, in the Exchequer Chamber, before the justices of both benches, the question was moved, whether the defendant should *forfeit* his market or not: and the statute of *quo warranto primo* was looked into upon this matter.”

TREMAYLE. “It seems to me, that he should forfeit his market, for the statute provides, that if the defendant come not at the return of the *venire facias*, then it may be done, as it might be in the eyre, and I say, that before justices in eyre, if the party who hath the franchise come not, then the franchise shall be seized into the King's hands *nomine districtionis*; and if the party who ought to replevy the franchise come not during the eyre, in such county, he

(a) *Rex v. Amery*, 397—399.

ought to forfeit the franchise *for ever*, and so it happened in the eyre of Kent:—such a franchise was seized, *nomine distractionis*; and therefore Herby, then justice in eyre, said,—Let the party come sitting the eyre, or otherwise he has lost his franchise for ever. So here, when he had day the last term by the venire facias, which was *the last process in such action*, and the party did not come, all this term it shall be in the King's hands: *but nevertheless the party shall have replevin of it, when he comes.*”

COLLOW. “I think otherwise, for often in our law, if a man make default on certain process, the plaintiff shall have his recovery; as if a man be outlawed in a personal action, on which the defendant purchases his charter of pardon, and has *scire facias* against the party, to shew why his charter should not be allowed; if the sheriff return the *scire facias*, and he come not, the charter shall be allowed for ever, and shall not be allowed, *salvo jure petentis*; for by common intendment, when he is summoned, and comes not, he does not mean to pursue his writ. And if the sheriff return the writ, *non est inventus*, vel *nil habet*, he shall have a *sicut alias*; and if he return *nil habet*, or *non est inventus*, the charter shall be allowed, for *the process is determined by course of law*. So in the case here, *he has no other process after the venire facias returned*, wherefore, &c.”

FINCHAM. “To the same purpose, and that the franchise shall be forfeited for ever; for when the King sues against the defendant, *quo warranto*, &c, he takes this suit, to the end, that if the defendant shew good title in himself, he should hold his market; and if he cannot shew good title, then the King might seize it; and when it is seized, then no market can be held thereafter; and if the party might then have his replevin, the King would have no effect of this suit, and the party has lost his market, by his own

laches, and this is not against reason, as if the King grant me certain lands by letters patent, which he hath before granted by letters patent to another, and I have a *scire facias* against the first grantee, to shew why his letters patent should not be repealed; if he make default at the *alias* and *pluries*, the letters patent of the first grantee shall be made void, and annulled, by reason of his own laches. So here, because the defendant hath surceased his time, there is reason that he should lose his market."

CATESBY. "At common law before the statute of non-claim, if the tenant in a *precipe quod reddat*, had made default, at the return of the *grand cape*, and did not come within forty days after, he never could wage his law, inasmuch as the land was taken into the King's hands, but the party might recover the land still, but now the statute hath taken away this. But in the case at bar, the common law was before justices in eyre, that if he who had such franchise, did not come before the justices *during the eyre*, then the franchise should be forfeited; and now the statute is, that after the *venire facias*, if the defendant make default, it shall be done as it was before the justices in eyre; therefore, it behoveth, that he now forfeit his franchise by the statute" (a).

NELE. "I think otherwise; and as to the case put by Collow of the *scire facias*, upon a charter of pardon, I agree, that the charter shall be allowed, if he (the plaintiff in the action) do not appear at all; for otherwise his (the defendant's) body should be imprisoned for ever, which would be a great mischief; but it is otherwise here, for none of the parties is in such mischief; *and so it would be against reason, that when a man has a title to have any thing, he should forfeit it for ever, for such a short delay; wherefore it*

(a) These four speakers were not now judges.

is reasonable, that the franchise shall be seized, and that the party may replevy when he will sue it."

LITTLETON. "I think otherwise; for at the common law, before the justices in eyre, if the party was summoned, and came not during the eyre, he shall forfeit his franchise for ever; therefore, and the rather since the statute gives a longer process, and nevertheless he makes default, there is the greatest reason that he should forfeit for ever."

NEDHAM. "I think otherwise; and granting that the law was before justices in eyre, that if the party came not, sitting the eyre, he should forfeit his franchise; still I say, he ought not to forfeit it in this case; for in the same manner that he might come, sitting the eyre, to shew by what authority he claimed to have the franchise; the same form is to be observed before justices of the King's Bench, and the King's Bench at all times continues; and therefore *at all times* he may come and replevy his franchise; and therefore the market shall not be forfeited, but shall be seized, as Neale has said."

BILLING. "If the market should not be forfeited, the King cannot have any effect of his suit, as Fincham hath said; and therefore what shall the judgment be? shall it be, that the market be seized into the King's hands? or, that the market be ousted, &c.?"

PHILPOT (a). "The judgment cannot be given, that the market be seized; for when it is in the King's hands, it shall not be held as a market; wherefore the judgment ought to be, that the market shall be ousted, &c."

BRIAN. "The judgment shall be given, that the market shall be seized, &c. and that shall enure by way of

(a) This speaker was not a judge.

extinguishment; as if I grant to the King a market, which I have of his gift, this grant is good, and shall enure by way of extinguishment; and as to what Nedham has said, that the King's Bench always continues, I agree to some intents, but not to this; for now here the King's Bench shall be taken, as for the one term, in which the *venire facias* was returned, and not otherwise."

BILLING. "If the party have continued this market by wrong, and by no title, as by grant of the King, or other manner, then the judgment shall be given, that the market be ousted; but if the King, or his ancestors, have granted the market to the defendant, and he has *misused* it, or *not* used it, the judgment shall be, that the market shall be seized, &c. for I have seen where a man (plaintiff) hath sued a writ of nuisance of his market; the judgment was given, that the defendant's market should be seized, &c. But here non constat curiæ, whether this market commenced by wrong, or by grant, wherefore there is the greater reason, for the uncertainty, that the judgment be given, that the market shall be seized,"—"cum hoc concordant alii justiciarii—as to the judgment to be given, as Billing had said."

JENKINS, in his Centuries (a), reports the case thus: "A quo warranto is brought in the King's Bench; the defendant being summoned makes default; and another default at the return of the *venire facias*; judgment shall be, that the franchise shall be seized into the King's hands; *and not that it shall be forfeited*; for it does not yet appear whether there be cause of forfeiture.—No man shall finally lose his land, or his franchise, on any default, if he has never appeared."

(a) 141.

THE chief baron (*a*), who delivered the opinion of the judges, in the House of Lords, in the case of the King and Amery, on this part of the case, after stating the judgment against the corporation of Chester (*b*), expressed himself to this effect: that considering this judgment according to the letter of it, it was much easier to say what *it was not*, than what it really was, or what it was meant to be. That it was not a *final* judgment, for the court reserved to themselves, "to make further order if they should think fit;" it was not *perpetual*, for it was expressed to be only until the court should make further order; it was not a judgment on the right of the King, for it *decided nothing*, and it expressly reserved the power of deciding; it was not a judgment against the corporation, for the same reasons which shewed that it was not a judgment on the right of the King.—It could not be considered with more advantage to the defendant, than by supposing it to be as full, as complete, and as perfect a judgment as the court could by law pronounce against the corporation in the actual state of the case. In the words of Jenkins, it was clear law, "that no man should finally lose his land, or his franchise, on any default, if he had never appeared." And, with regard to franchises, the court had no authority to do more than to award seizure into the King's hands, *nomine districtionis*; and this judgment could have no further operation than to put the King's hands on the franchise, for the purpose of distress, without touching the right. When the franchise was seized into the King's hands for want of appearance on the first day of the eyre, it was to remain in his hands till his further orders; these were his *legal* orders, communicated in the proper channel by his courts of law: the King had only a *possession*; there

(a) Eyre. Vid. p. 494

was no day prefixed to the party to come in and claim after seizure, either before the King or in the Itre; but it was clear that the party might come in at his own time, at least during the eyre, whether he could come in afterwards or not: though this process appeared to be, in the nature of it, seizure *nomine districtionis*, it could not readily be collected how it could be extended into either process or judgment that could bind the right; and it was not easy to conceive how the right should be bound without some process of judgment; yet in the case of the market in 15 Ed. 4, it was stated by Littleton, one of the justices, "that at the common law, before the justices in eyre, if the party was summoned and came not during the eyre, he should forfeit his franchise for ever." And one of the counsel, stating the same idea with more particularity, said, "I say, that before justices in eyre, if the party who hath the franchise come not, then the franchise shall be seized into the King's hands *nomine districtionis*; and if the party who ought to replevy the franchise, come not during the eyre in such county, he ought to forfeit the franchise for ever; and so it happened in the eyre of Kent, and therefore Herby, then justice in eyre, said, let the party come sitting the eyre, or otherwise he has lost his franchise for ever:" thus he made no distinction between the consequence of not coming after a seizure for non-claim, and the consequence of a seizure for default of appearance after a summons; and probably he was so far right. It was presumed, the franchise was not forfeited by virtue of this seizure, for that which was process of *distringas* originally, could not change its nature, and become final judgment on a right in consequence of the party's not coming in during the eyre; but Herby tells you, that all this must mean that the party should never be permitted to replevy afterwards, and

and as, by the rule of the eyre, he must replevy before he could claim, he could never claim, because he could not replevy, and thus, in an indirect way, he should lose his franchise.

THE chief baron then, alluding to the process in the writ of right, which he shewed was not conclusive on the defendant, who did not appear, observed, that it was strange and anomalous, that in a proceeding in a writ of right, which this writ of *quo warranto* was, the party should lose his right in that very intricate way in which alone he *could* lose it, without judgment, and without any summons, after the seizure was first made: he conceived that this was not the law of the *iter*; and that nothing short of forejudger barred the right for ever. Sir Edward Coke had too hastily, in the judgment of the chief baron, adopted this doctrine from the year-book of 15 E. 4; but he had furnished his readers with an extract from a year-book of greater antiquity, which was a much better authority, and went a great way indeed to prove that *he*, and those who decided, if indeed they did decide, that case in 15 E. 4, utterly mistook the law.—This was the case from the year-book of 2 E. 3, cited likewise by Sir Edward Coke in the case of *Strata Marcella* (a). It was in error in the King's Bench, on a judgment of forejudger in *quo warranto* before justices in eyre: the judgment was reversed for two reasons which Sir Jeffry Scrope openly declared; first, that the justices in eyre were mistaken in ousting the defendant of aid where it was grantable, and secondly, that they had *forejudged* the defendant of the franchise, “for,” says Sir Jeffry, “in some cases, the franchise ought to be seized into the King's hands; in some seized, as in his right, till the party has made fine—and in some shall be forejudged, but forejudger

(a) 9 Co. 28. Vid. ante, p. 396, 7.

holds *for ever*:" a strong inference that seizure in right of the King, or seizure into the King's hands, which evidently means *nomine districtionis*, did *not* hold for ever.—Here then, said the chief baron, are the seizures *nomine districtionis*, the seizure in right of the King, and the final judgment on the right clearly marked out—when in this case they came to the King's Bench, it was insisted that the party having made default after appearance, he had forfeited his franchise. "It is not so," says Sir Jeffry, "but he shall be fined and suffered to plead, and there is a diversity between replevin and fine; for replevin lies where the franchise is not claimed in time, and fine lies in the case *ut supra*, and other like cases."

THE chief baron said, he believed this was the only case to be found in which even the *counsel* argued that a forfeiture was incurred by reason of not appearing, or not making claim at the last eyre, either upon mere non-claim, or having made default of appearance in the last eyre, and not appearing during the eyre.—That this was well founded, he shewed by a minute examination both of the rolls of the iters in the Exchequer, and of all the printed accounts of the proceedings in those early times. He then reverted to the case in 15 Ed. 4, and remarked that it seemed sufficient to condemn the doctrine there laid down, of forfeiture being incurred for want of appearance and replevin; that the court shrunk from its own principles; for after agreeing, as it should seem, that by analogy to the rule of the eyre, a forfeiture had been incurred by the defendant in the case before them, they pronounce a judgment *quousque*.—How it happened, continued the chief baron, that the judgment was in fact entered in this manner, could only be conjectured. Billing's reason for forfeiting the franchise, "because otherwise the King cannot have any effect of his suit,"

suit," appeared certainly to have great weight.—The reference by the statute to the proceedings in eyre, and the *supposed* course of proceeding there, strengthened the observation. Their argument all tended to induce forfeiture and final judgment; why the final judgment was not given it was not easy to imagine, but after the court are understood to have agreed that the market was forfeited, and that, therefore, final judgment ought to be given, Billing starts another difficulty: —

BILLING. "Shall the King have a *capias pro fine* in this case or not?"

CATESBY. "He shall not; for it may be, that the party hath good right to this market, and so hath done no wrong to the King; and if a tenant in a precipe quod reddat make default upon default, so that the demandant hath judgment to recover, the tenant shall not be amerced, for still no default can be adjudged in the tenant; so here—if no wrong can be adjudged in him who claims the market, there is no reason to grant a *capias pro fine*."

CHOKER. "If we say the judgment is right, then a *capias* shall issue, for the judgment shall be accounted like the case of a trespass confessed, in which case there shall be a fine."

If I may presume, said the chief baron, to say so of men of great learning and talents, who lived much nearer than we do to the times when this proceeding was in use, I cannot imagine that those judges perfectly understood the subject before them; for in the proceeding by writ of quo warranto, I do not apprehend that there could be a judgment of *capias pro fine*: the defendant comes in; he is in the nature of a plaintiff; he makes his claim; if he fail in making it good, there is no judgment of *capias pro fine*; but the judgment is *quod sit in misericordia*. But Choke, continued the chief baron, reasoned right though his principles

ciples were wrong: on the *supposition* that there *might* be a *capias pro fine*, he reasoned right; "if you mean that there should be a forfeiture here, it confesses the trespass, and therefore there ought to be a *capias pro fine*." Might not Choke's observation have led the judges to reconsider their opinion, to have changed it, and to have pronounced the judgment in the form in which it now appears? It is impossible to reconcile the form to the reasoning.

HERE the entry on the controlment rolls becomes material. There is an entry of subsequent process, both of *venire* and *distingas*, continued to the death of the party.— This suggested some other observations. The entry left no room to suppose that the judgment which the court intended to pronounce was entered erroneously; they could not have intended to pronounce a *final* judgment where they continued to issue process to compel appearance: to issue further process was altogether inconsistent with *final* judgment, but was perfectly consistent with a judgment *quousque*, that being understood to be a regular award of process in the nature of a distress.

THIS entry weakens the force of Billing's reason for making a default work a forfeiture: if the proceedings were to be at an end on the seizure for default, and the King could by no possibility go on, it seemed to be a reasonable thing, that the King should have the effect of his suit by some judgment or other in that stage of the cause: but if, after a liberty was taken into the King's hands *nomine districtionis*, process might still go on against the party to bring him in, either for the purpose of forejudging the franchise, or of having a decision and amercement if the claim were false, or for any other imaginable purpose; it was not true, as was alleged in this case, that the process was determined by due course of law, and that nothing was

was to be done after the *venire facias*. There was an appearance of great regularity and precision in the entry: credit must be given to the roll that the process actually issued, and the purpose was apparent; it was to compel that appearance which the seizure had not effected, and if there could be no forejudger of the franchise before appearance, this process was the necessary means to obtain the effect of that suit. Proceedings in eyre were directly analogous to this very course of proceeding which prevailed, in this case; though certainly the whole of it was inconsistent with the argument as found in the year-book, both of the judges and of the counsel.

“THUS,” continues the chief baron, “I think myself warranted to conclude upon the whole of this part of the argument, not only that the judgment against the corporation of Chester did not import a forfeiture or forejudger—but that no forfeiture or forejudger was incurred in the actual circumstances, or could have lawfully been adjudged upon the default which is stated in these pleadings.”

BUT the question still remained, what *was* the effect of this judgment? It had been objected that it had no operation at all, as it was but an award of process not followed up by an actual execution.—It had been answered, that by force of the judgment “that the liberties *should be* seized,” they actually *were* in the hands of the King. It was certainly true, the chief baron said, that where the right of the King is found by matter of record, adjudged possession in law followed, and the adverse possession, in fact, became usurpation upon the King. But with regard to award of seizure *nomine districtonis*, as contradistinguished from seizure in right of the King, it seemed to him to be clearly otherwise: the statute of quo warranto said, “the liberties shall be taken into the King’s hands by the sheriff of the place.”

place." So said Britton, and so said Keilway in all the cases where this subject occurred ; and in the case of the King and Quadryng itself, there was a writ to the sheriff to seize, which appeared to have been regularly returned ; from all which he concluded that there ought to have been a writ to the sheriff. But he did not think that any stress ought to be laid on the circumstance of a writ to the sheriff not appearing upon the record. If such writ was necessary, he thought, that, at such a distance of time, it must be presumed that it actually did issue and was returned.

WHAT then was the effect of this judgment ? He conceived that its operation, *in law*, corresponded exactly with the effect, which he concluded, from the language of the charter of James 2, it had in point of fact ; that it laid the King's hands on the franchise of *being* a corporation, and upon the other franchises in the information, so that the corporation could not *use* its liberties ; the action of its vital powers was *suspended* : and in this situation, he had no doubt but that a *custos* might have been appointed. Instead of this, the crown had introduced into Chester another corporation by charter, to whom the custody of the city was committed, and to whom liberties, either precisely the same, or similar to those which the old corporation had, were also granted. This was certainly to the prejudice of the rights of the old corporation ; and on the grounds of argument already stated, this charter was void, as against the right of the old corporation, except as to the custody. For a time, indeed, the old corporation were not in a condition to shake off their custos, or to assert their rights ; but they were always intitled to have redeemed their liberties on a fine to the King for their default. It so happened that the necessity of the times served them

them in the place of a sum of money; and by virtue of the charter of pardon and restitution, the King's hands were removed: they returned to a condition to exercise their liberties; the power of the new corporation, as *custos*, necessarily ceased, and to every other purpose the letters patent became void and of no effect (*a*).

It now remains to consider the effect of a *final* judgment.——The judgment against the city of London was thus. “For this that it appears to the court here, that the aforesaid mayor, and commonalty and citizens of the city aforesaid, have forfeited to the lord the King the liberties, privileges, and franchises aforesaid, for the causes in the replication aforesaid, by the attorney general above specified; that the pleas of the aforesaid mayor and commonalty and citizens of the city aforesaid, in rejoining and rebutting in that behalf pleaded, and the matter therein contained, are not sufficient in law to preclude the said lord the King from the forfeiture aforesaid, or for the mayor and commonalty and citizens of the city aforesaid to claim the liberties, privileges, and franchises aforesaid to be allowed and adjudged to them: and on mature deliberation thereupon had;

“It is considered that the liberty, privilege and franchise aforesaid, *to be* of themselves one body corporate and politic, in deed, fact, and name, by the name of mayor, commonalty, and citizens of the city of London, and by that name to sue and be sued, to answer and be answered, by the same mayor and commonalty and citizens of the city of London aforesaid, above claimed, be *taken and seized* into the hands of the lord the King, and that the aforesaid mayor and commonalty and citizens of the city

(*a*) Vid. the judgment in *Rex v. Amery* in the House of Lords, in the account of that case in two volumes quarto.

of London aforesaid, be taken to satisfy the said Lord the King for a fine for the usurpation of the liberties, privileges, and franchises aforesaid."

THIS judgment was given in 1683, but no execution ever issued; and it appears by the statute of 2 W. and M. ft. 1, c. 8, either that the city continued in the actual enjoyment of their franchises in the same manner as if no judgment had been given, or that a new charter conferring either the same or similar privileges had been granted by Charles the second or James the second.—In the 1 W. and M(a). an act passed, by which it was enacted, that if any person *then* having any office or employment, civil or military, should neglect or refuse to take the oaths thereby appointed to be taken, in such manner as by that act is directed, before the first of August, 1689, the office or employment of every person so neglecting or refusing should be void.—In 1690 the statute of 2 W. and M. ft. 1, c. 8, was made, by which, after reciting among other things, "that judgment had been given on an information in the nature of quo warranto, exhibited in the court of King's Bench against the mayor and commonalty and citizens of the city of London, *that the liberty, privilege, and franchise of the said mayor and commonalty and citizens, being a body politic and corporate, should be seized into the King's hands as forfeited;*" it is enacted, "that the *said* judgment, and all and every other judgment given or recorded in the said court, for seizing into the King's hand *the liberty, privilege, or franchise of the mayor and commonalty and citizens of the city of London, of being of themselves a body politic and corporate, &c.* shall be reversed, annulled, and made void."

THIS statute abrogates any charters that may have been made and granted to any persons constituting the corporation

(a) 1 W. and M. ft. 1, c. 8, s. 6.

tion of the city, or any of the fraternities within it; but ratifies all proceedings in law or equity under such new charters, indemnifies the persons and officers acting under them; confirms all leases made under proper restrictions, and the freedom of every person obtained in any of the companies in the interval between the judgment and the reversal; directs that all the *annual* magistrates then actually in office shall continue till a new election of such annual magistrates, the time for which is appointed by the act; but if no new election should take place at that time, directs that they shall continue till the ordinary and customary time for elections, when all officers and magistrates shall be chosen as usual; and enacts, "that all officers and ministers of the said city, that rightfully held any office or place in the said city, or liberties thereof, or in the borough of Southwark, at the time when the said judgment was given, shall be confirmed and shall have and enjoy the same as fully as they held them at the time of the said judgment, except such as have voluntarily surrendered any such office or place, or *have been removed for any just cause.*" Then it enacts that all persons so to be restored and continued shall take the oaths appointed to be taken by 1 W. and M. next term after such restitution.

THE session of parliament in which the st. 1 W. and M. was passed, began 13th of February, 1688.

SIR James Smith was an alderman of the city at the time when this judgment was given in the quo warranto; he did not take the oaths prescribed by this statute before the first of August, 1689; for which reason he was, in point of fact, removed from the office of alderman by those who exercised the functions of the corporation, as it seems, some time before the ^{1st} statute for reversing the judgment. In consequence of that statute, Sir James Smith, in 1691, brought a mandamus to be restored.

THE defendants returned, "that Sir James Smith, on the 13th of February, 1688, was one of the aldermen of the city of London, to that place and office, *before* that time, duly elected and preferred, according to the custom of the said city, and from the said 13th of February, 1688, to the first of August following, remained one of the aldermen; but that at any time before the said first of August he had not taken the oaths prescribed by 1 W. and M. but to take the same, before the said first of August, had altogether neglected; whereby, and by virtue of the said act, the said office became void; and that the said Sir James Smith, at any time after this neglect, was never elected into the office of one of the aldermen; and therefore they could not restore him."

THOUGH, in this return, no notice is taken of the judgment against the city, yet the effect of the latter was made, at first, the principal subject of discussion. The obligation on Sir James Smith to take the oaths, it was said, depended on the question, "whether he was an alderman at the time when the statute requiring them was made?" If he *was* an alderman, the defendants had returned a good cause for not restoring him. If he was *not* an alderman, then he was not bound to take the oaths before the first of August, 1689, and, consequently, by virtue of the act for reversing the judgment against the city, he was intitled to reassume the office he had held *before* that judgment was pronounced. But this question, whether he was an alderman or not, depended on the effect of the judgment: if by *that* the corporation *was* dissolved, he was *not* an alderman at the time when the oaths were to be taken; if the corporation was *not* dissolved, he *was* an alderman, and ought to have taken the oaths; not
having

having taken them, he was removed for just cause, and consequently was within the exception of the act for reversing the judgment.—But after the case had been argued several times, it was discovered, that no notice being taken of the judgment in the return, the former could not be considered by the court, and that, had the act for the restitution of the city not been made, the only question would have been on Sir James Smith's neglect to take the oaths. But this act being a *general* law, the court were bound to take notice of it, which they actually did, and made the question of Sir James being an alderman or not, depend *not* on the effect of the judgment as really entered on the record, but as recited in the act.—On the *general* question, whether a corporation could be dissolved by judgment for a forfeiture, the court all agreed that it *might*, though they differed as to the proper *form* of such a judgment. They all agreed, however, that it was not dissolved by the judgment *as recited in the act*; which was, “that the liberty, franchise, and privilege of the city of London, *being* a body politic, &c. should be seized.” Here the word *of* being omitted before the word *being*, the judgment was not against the corporate existence of the city, but against the franchises it enjoyed: and Holt said, “that a corporation might subsist after its franchises were taken away; for that these were not essential to it, but only a privilege appertaining to it; that the essence of a corporation was to make bye laws, and govern their members, which they might do though their franchises were seized” (a).

WHEN a corporation has lost an integral part, or is so far reduced that it cannot continue the succession, it is

(a) Sir James Smith's case, 4 Mod. 52. Skinner, 310, 312. 1 Show. 263, 274. Carth. 217.

dissolved without any legal proceeding : but for a forfeiture a corporation is not dissolved without a judgment in a court of law to enforce it. “ A *scire facias* is proper,” says Mr. Justice Ashhurst (*a*), “ where there is a legal existing body, capable of acting, but who have been guilty of an abuse of the power entrusted to them ; for as a delinquency is imputed to them, they ought not to be condemned unheard ; but that does not apply to the case of a non-existing body. A *quo warranto* is necessary where there is a body corporate de facto, who take upon themselves to act as a body corporate, but who, from some defect in their constitution, cannot legally exercise the powers they affect to use.”

WHEN a corporation is dissolved, the King may either restore it, or may incorporate another set of men in the same place (*b*).

THE effect of the dissolution of a corporation is, that all its lands revert to the donor ; its privileges and franchises are extinguished ; and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it, in their natural capacities. What becomes of the personal estate is, perhaps, not decided ; but probably it vests in the crown (*c*).

THE consequence of a charter of restitution, is that the corporation becomes intitled to its former rights and franchises, and subject to all its former obligations (*d*).

(*a*) In *Rex v. Pasmore*, 3 Term Rep. 244.

(*b*) Vid. *Colchester v. Seaber*, 3 Bur. 1866. *Rex v. Pasmore*, 3 Term Rep. 199, *passim*.

(*c*) Vid. Co. Lit. 13. 1 Lev. 237. Pollexfen's Arg. *Quo War.* 112. *Rex v. Pasmore*, 247. *Colchester v. Seaber*, 3 Bur. 1868.

(*d*) Vid. *Colchester v. Seaber*, 3 Bur. 1866.

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